CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA

AT

NEW ORLEANS,

IN

NOVEMBER, 1883.

JUDGES OF THE COURT:

Hon. EDWARD BERMUDEZ, *Chief Justice.*

Hon. FÉLIX P. POCHÉ,
Hon. ROBERT B. TODD,
Hon. CHARLES E. FENNER,
Hon. THOMAS C. MANNING,
} *Associate Justices.*

No. 8613.

F. W. TILTON ET AL. VS. THE NEW ORLEANS CITY RAILROAD COMPANY.

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The sale by the City in 1809 of lots fronting the space selected for the purpose and known generally as the "*neutral ground*," was made in reference to the dedication, as shown on the plan drawn up at the time, from which it appears that the space was described as "*Rue et Promenade.*"

The right of the Naivgation Company was subsequently acquired by the City.

The destination of the strip of ground, was not changed by the City. If it was altered, the City had the right to do so, derived from the Code, the Statute and her charter.

The City has authority to grant a right of way through her streets and other property.

The City first granted the privilege of way to the New Orleans City Railroad Company in 1876, but subsequently recalled it, and again in 1881 conferred it anew.

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The plaintiffs were owners at the time the tracks were laid and did not object thereto. Their silence is an acquiescence.

The right to use steam not having been granted, the Company has no authority to run and station their trains, moved by that power, as they do, between the designated points.

The use of steam is therefore a nuisance, if not actual, at least constructive.

The injunction asked cannot issue to prevent the defendant Company from using the tracks, but only to prohibit the use of steam, between the two streets named.

APPEAL from the Civil District Court, for the Parish of Orleans. *Houston*, J.

Breaux & Hall for Plaintiffs and Appellants:

1. The neutral ground on Canal street, occupied by defendant, was dedicated as a promenade. Plaintiffs having acquired their property with reference to such dedication, had vested rights to the same, of which they could not be deprived by the vendor corporation. Act of Congress, 1807, March 3d, U. S. at large, p. 441; Act of Deposit by Macarty, Mayor, Rec. p. 181, Map; French vs. N. O. and Carrollton R. R. Co., 2 An. 87; Sarpy vs. Municipality No. 2, 9 An. 598; Municipality No. 2 vs. Orleans Cotton Press, 18 L. 237; Cincinnati vs. The Lessee of White, 6 Peters 431; Delabigarre vs. Municipality No. 2, 9 An. 233; New Orleans vs. United States, 10 Peters, 710.
2. No particular form or ceremony is necessary in the dedication of land; and the subsequent acquisition of title to property dedicated to public use, by the donee, enures to the benefit of the dedication. New Orleans vs. United States, 10 Peters, 713; Sarpy vs. Municipality, No. 2, 9 An. 597; Delabigarre vs. Same, 3 An. 233.
3. The sovereign alone has the right to change the destination of public places. New Orleans vs. United States, 10 Peters, 713; Parish vs. Municipality, 8 An. 149. Even this is denied by Judge Martin in DeArmas vs. Major & Co., 5 L. 158.
4. That which, from being pursued under authority of the law, cannot be a public nuisance, may be a private nuisance. Wood on Nuisances, p. 788, Sec. 751; p. 796 (note); Dillon on Corporations, § 521.
5. When the complaint shows that he suffers special and peculiar injury from a nuisance, he is entitled to an injunction. High on Injunctions, § 755, note 4; Wood on Nuisances, p. 835, Sec. 783.
6. The defendant is operating a road with steam trains, on Canal street, without legal right.

(a) Granting the administration of franchises, and selecting the hands into which they shall be put, is a State prerogative; and it can be transferred only with the assent of the State, and in the mode pointed out. N. O. Spanish Fort R. R. Co. vs. Delamore, opinion book, p. ; Thomas vs. Railroad Company, 101 U. S. 83; The N. Y. & Maryland Co. vs. Williams, 17 Howard 30.

(b) Neither the act incorporating the New Orleans, Metairie and Lake Company, nor the act of 1874, authorizing business and manufacturing corporations or companies, warrant the consolidation invoked. Acts. of 1869, p. 205; Act of 1874, p. 18; bound Acts 1875.

(c) The City Charter only grants power to regulate the running of steam trains. Acts of 1870, par. 11, Sec. 9.

7. The purposes, objects and character of a corporation to run city railroad cars for passengers, is essentially different from those of an ordinary railroad to carry freight and passengers.

   The one exercises privileges under a license by the City; the other exercises a franchise which can be granted only by the State. Brown vs. Duplessis, 14 An. 892; Pierce on Railroads, pp. 246-7; New Orleans, Spanish Fort R. R. Co. vs. Delamore, opinion book, p.
8. The unauthorized extension by a railroad of its track, is the attempted exercise of a valuable franchise, and is, of itself, sufficient ground for perpetuation of an injunction. High on Injunctions, Sections 412, 415, 408; 10 Miss. 82; 45 Barbour, 63; 27 N. Y. 611.

9. When a company lays its rail on a street without statute authority, it may be enjoined by lot owners specially injured. Dillon on Corporations, § 561; Railroad Company vs. Shields, 33 Ga. 601.

Braughn, Buck & Dinkelspiel for Defendants and Appellees:

The United States having, by Act of Congress of March, 1807, granted and donated to the City of New Orleans all the property known and designated as the "Commons," acquired by the treaty and cession of the Province of Louisiana, the City of New Orleans was at liberty to dispose of the same, as in the judgment of her municipal authorities it might be for the best. The grant of Congress was, however, coupled with one condition, viz: That the City of New Orleans was to reserve a strip or portion of land sufficient for a canal through a portion of the said ceded "Commons," to enable the N. O. Navigation Company to connect its canal and basin (at present the Old Basin and Canal Carondelet) with the Mississippi River. The Navigation Company, in pursuance of the provision and reservation specially made in its interest, and embraced in the third section of the Act of Congress of March, 1807, selected the space at present known as the Neutral Ground on Canal street between South and North Canal streets.

The City of New Orleans took no action and made no disposition of the "ceded Commons," which embraced a wide space of ground all around the limits or boundaries of the City as it then existed, until the year 1809. The Commons at the upper limit of the City extended from Customhouse street to the line of present Common street.

In 1809, under the administration of Mayor John T. Mather, the Council of the City determined upon a survey and subdivision of the entire Commons into blocks and lots, and on a sale of the same on ground rent titles, for a period of 39 years, and an ordinance to carry out this plan was passed.

The city surveyor, under this ordinance, at once proceeded to a survey and subdivision of the Commons. The sale of lots within these Commons commenced the following year, viz: in 1810, the lots numbering from 1 to 459 by plan of "Tanesse, surveyor." The first lot sold, or Lot No. 1, formed the corner of Dorsière and present North Canal street, the site of Stauffer, Macready & Co.'s hardware establishment. The acts of sale of this and other lots, now fronting on North and South Canal, describe the lots, when on the lower side, as fronting on a projected road *(chemin projeté mesurant)* or measuring — feet in width, up to the lower line of the space of 42 feet, French measure, reserved for the Navigation Company, and when said lots were on the upper side, at present South Canal street, they are described in the acts of sale, all passed before Pedesclaux, notary, as measuring — feet front on a projected road (chemin projet) measuring — feet in width, and extending to the upper limit or line of "the reservation" between the two projected roads, for the Navigation Company.

In none of the acts of sale which conform in description with Tanesse's plan, are the lots described as fronting on a public promenade or on Canal street. What has since been named on some maps, made many years later, as Promenade or Neutral Place, appears in none of the original titles when the property was sold in 1810, 1811, 1812, 1813, 1814, 1815, and so on, strictly according to Tanesse's plan, which was the official plan, determining measurement and all other rights. The term Street or *Rue* as applied to present Canal street, appears neither on the plan or in the act of sale; *or* by *chemin projeté*. In point of fact the Canal street of that period, was a road way along the Gravier Canal, into the Faubourg St. Mary, on the extension of Poydras street, and was laid out as early as the year 1795, and is at present the site of North Poydras street. This is the "Old Canal street," referred to by Justice Rost in the case of "French vs. Carrollton Railroad." The Navigation Company, at some period in the past, had acquired the Gravier Canal and had proposed also to connect the Old Basin with this Gravier Canal and a New Basin in the St. Mary Faubourg. This was long before the Canal and Banking Company undertook the excavations of New Canal and New Basin.

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The name of Canal street to the wide avenue which now bears the name, is of later date.

It may be well to know that the present middle space was held by the Navigation Company until the year 1842, as its own and private property.

By Tanesse's plan of 1809, it is not set apart as a public dedication; it is not designated as a promenade, nor is it so indicated or designated in the conveyances of the lots; but, on the contrary, it is especially designated as a "reservation" between two projected roadways, for the Navigation Company.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an injunction suit coupled with a prayer for damages, to prevent the defendant Company from running and stationing their steam cars and trains in front of the residences and stores of plaintiffs, on Canal street in this City, between Rampart street and Bourbon and Carondelet streets, the last two meeting and intersecting the first named street.

The grounds upon which the injunction is claimed are: that the strip of ground, on which the cars run and station, in the centre of the space between the buildings, fronting on each external line of the double street, and commonly known as the "*neutral ground*," was dedicated by the City to public use as a street and promenade; that the plaintiffs, having acquired their property from the City with reference to such dedication, have a vested right therein and cannot be divested thereof by the City; that the defendants are thus operating their trains without legal authority; that the use to which said strip of land was and is thus devoted, is an intolerable nuisance, greatly prejudicial to the plaintiffs in their persons, and detrimental to the value of their property; that they, the plaintiffs, are entitled to have such nuisance abated and to claim damages for the injury sustained. The petition concludes with a prayer that an injunction issue and be perpetuated, and that the plaintiffs recover forty-five thousand dollars damages, to accrue to them in different proportions.

After a hearing on the face of the papers, an injunction was allowed, which was subsequently dissolved on bond.

The answers contain a denegation of the pretensions and charges preferred, particularly of a want of authority to the right of way and of running the steam cars, on the strip of land in question, and of the truth of the complaint that the exercise of such privilege has resulted into an intolerable nuisance. The defendants further plead, that the plaintiffs are not entitled to an injunction, and that their money claim is barred by prescription.

From a judgment dissolving the injunction and rejecting their demand, the plaintiffs have appealed.

The fact that the defendants run and station steam cars and trains, as charged in the petition, is not disputed. The right of the plaintiffs to complain, if the running and stationing are unauthorized, and if the same are an intolerable nuisance, cannot be questioned.

The parties litigant have raised, argued and submitted many issues, only two of which we think should be determined, to set their differences at rest. They are:

1. Have the defendants legal authority to run and station their cars as they do?

2. If they have such authority, is the exercise by the use of steam of the right thus acquired a nuisance which should be abated?

I.

The record shows that, on the 22d of August, 1876, by Ordinance 3617 A. S., the City Council gave a permission, revocable at pleasure, to the Company to run their cars between Basin and Carondelet streets; that, on the 15th of June, 1880, this permission was recalled by Ordinance 6528. It was renewed on the 3d of March, 1881, by Ordinance 6891, at the request of a large number of citizens styling themselves property holders and residents on Canal street, and authority given the Company to extend its track from Basin to Carondelet streets.

The municipal authority to thus use the neutral ground is so clearly given, that, but for the denial of the power of the council to make the concession, the first question would be of easy solution.

The plaintiffs contend, first, that the City had no right to grant the privilege of way; because:

A. The strip of land on which the cars are run and station, was dedicated to special public use; because

B. The City has no right to change the destination of a public place thus consecrated.

It appears that the United States having acquired, by the treaty of cession of Louisiana, the property known and designated as the "*commons*," donated the same in 1807 to the City of New Orleans, with the conditions: that a reserve would be made of a strip through a portion of the same, sufficient for a canal, to enable the New Orleans Navigation Co. to connect its canal and basin with the river, and that the same would forever remain open as a *public highway*. The space in question measuring 42 feet, French measure, was that selected for the purpose.

In 1809, the City authorities caused the commons to be divided into blocks and lots. Many were sold for ground rents. The titles describe them as fronting on a projected road up to the line reserved, upper or lower, for the Navigation Company.

In 1809, twenty-seven lots remaining unsold on Canal street, a plan was made of the same by the then City Surveyor, Pilié, which, by resolution of the Council, was to serve as a guide for the ordered sale. That plan shows that the space between the blocks on the upper and lower sides of Canal street, was thereon designated as "RUE ET PROMENADE DU CANAL." The lots of two of the plaintiffs figure on that plan.

In 1838, an attempt being made to excavate a canal on that middle space, it was arrested by the populace, who thought that the excavation would affect the public health, and the excavated spots were filled.

In 1842, the rights of the Navigation Company to the neutral ground were seized, offered for sale and adjudicated to the City of New Orleans.

In 1847, in the case of French vs. N. O., C. R. R. Co., 2 An. 87, passing allusion was made to old Canal street by this Court, and it was there said: "That street was laid out as a single street, and the proprietors, on both sides, purchased their lots with reference to that destination. The authority given to the Company to extend their canal through the middle of it was a change of destination of public property, not a divestiture of private ownership."

There can be no doubt that, from the beginning, the whole of the space was dedicated to public use. A strip, in front of the blocks, on each side, at first, 11 feet, presently, 18 feet wide, was devoted as sidewalks; then, two other contiguous strips of a certain width were laid out and used as streets, leaving between them the strip, forty feet wide, known as the "*neutral ground*," upon which the steam trains of the defendant Company and the horse cars of several other companies are run and station.

That dedication was, therefore, originally for the purpose of a contemplated canal and side streets, and subsequently, for "a street and promenade."

The question which next presents itself is, whether that dedication has been changed by the City, and if so, whether the City had the right to do so, and whether the plaintiffs can be heard to complain.

The evidence does not show that the neutral ground in question has absolutely ceased to be a "*promenade*."

The word is used without any limit, and means, as well, *promenade à pied, à cheval*, as *en voiture*, or any other, subject to municipal regulations.

The well known "Promenade des Champs Elysées," in the great French metropolis, is used for all three purposes.

The strip of land in question is not enclosed, either on its sides, or at

its intersections, by the several streets. Citizens are free to walk across or along it, at their discretion or option. It, therefore, remains accessible at all points.

The evidence does not show that it ever was used exclusively, if at all, as a pathway, or *promenade à pied*. It appears that, for a long while, it served as a place of deposit for rubbish, building materials and other purposes, which obstructed its use.

Far from establishing that the City has changed its destination, by destroying or affecting its *public* character and converting it to *private* conveniences, the proof is, that the City has, by her administrators, employed this common property for the greater good of the whole community. R. C. C. 458.

The City, it is of public notoriety, has, for upwards of twenty years, expressly permitted the use of this neutral ground for street car purposes, for the greater benefit and advantage of citizens travelling in different directions, not only without a murmur from anyone, but to the entire satisfaction of all.

The City had authority to do so. It is well settled, by law and precedents, that the City has a supervision and control over all streets *public places and other public property* within her limits, and may regulate the use thereof.

In 1859 the question was presented to this Court, whether the City had the power to sell the right of way for the establishment of a railroad, through its streets. It was determined in the affirmative, in a well considered and elaborate opinion, which was since followed: Brown vs. Duplessis, 14 An. 842; Board vs. City, 32 An. 915.

In the late case of Harrison, 34 An. 462, the present Court had occasion to review a similar or identical question. Supported by many authorities, from which copious extracts are embodied in the opinion, the Court held, that the doctrine is well settled that the legislature can delegate to a municipal corporation the power of authorizing the construction of a railway on a street of the city, as effectually as if the power and right had been conferred directly by the State herself. Dillon, Municipal Coporations, 556, 655; 27 Penn. Stat. 339; 33 Penn. Stat. 99; 6 Wheat. 328; 7 Barb. 509; 23 Peck. 328; 1 Barn. & Ad. 30; 18 Barb. 97; 12 Iowa, 246; 24 Iowa, 455; 10 Bush. 288; 87 Pa. 282; 3 Camp. 226; 5 Hill N. Y. 209.

In 1876, when the first ordinance was passed granting permission to the defendant Company to build a track and to establish a stand for the lake cars on Canal street, between Baronne and Carondelet streets, the City had the right to make the concession. Her authority for so

doing was: the provisions of the Code, the Statute Book and her Charter.

The Codal provisions are: That common property is that, to the use of which all the inhabitants of a city or other place, or even strangers, are entitled in common, such as streets, public walks, the quays, and that common property, though it belongs to the corporation and be not for the common use, may be employed for their advantage by the municipal administrators. R. C. C. 458.

The statutary provision is, that "no railroad, plank road, or canal, shall be constructed through the streets of any incorporated city or town, without the consent of the Municipal Council thereof." R. S. 689.

The Charter, Secs. 12 and 13, provide that the City Council shall have the power to regulate and make improvements to the streets, public squares, and *other public property*, and to regulate the proper government of carts, drays, carriages, omnibuses, and all other vehicles of every description, freight, *locomotive*, passenger and street cars, which run in the streets and within the limits of the city.

This power was, perhaps, better formulated in the present charter, (1882, p. 21) which provides that the City shall have power to authorize the use of the streets for horse and steam railroads. The City owned the middle ground, either as public or private property, and in either contingency could have disposed of it, the way she did.

Strenuous efforts were made in argument to establish that the consolidation of the New Orleans, Metairie & Lake R. R. Co., (incorporated by law) with the defendant Company, was illegal, and that thereby the latter did not acquire the right said to have been possessed by the former to run and station steam trains on the spot in question. It is unnecessary, presently, to examine whether the first corporation ever existed and what its prerogatives were. It is likewise needless to ascertain whether the consolidation of the two companies was legal or not.

The City does not grant franchises. This can be done by the State alone. But the City can concede the right of way through her streets, public places and other property. It is perfectly true that franchises cannot be transferred.

It is worthy of note, also, that the titles of two of the plaintiffs date back to 1849 and to 1853, before any track was laid on the neutral ground in question, while that of the third one, which was to be produced, was not furnished, and is not included in the transcript.

The plaintiffs, then, were front property owners when the City permitted the use of the neutral ground the way she did, for street car purposes, whether moving or stationing.

If it be true that the plaintiffs had vested rights under their purchases in and to the strip of land on which the cars are run and stand in front of their residences and stores, they should have been as watchful as if the same had been their exclusive property. They have slept on the same, and at this late hour how can they be heard successfully to complain?

The authorities are unanimous to the effect that, where a party stands by and silently permits the construction of a railroad on his land, it is too late for him, after the road is completed and large sums of money are expended on the faith of his apparent acquiescence, to seek, by injunction or otherwise, to deny to the railroad company the right to use the property.

The omission of resistance is an implied assent. The moment the work was completed without opposition, the public, the company, and all concerned in it, acquired a vested right to it. Hilliard on Inj., 43; High on Inj., 397, and cases cited; also, Goodin vs. Cin., 18 Ohio Stat., 169; 31 An. 480.

In the instant case, permission was first granted in 1876, and it has been enjoyed for four consecutive years without any judicial complaint on the part of plaintiffs. The privilege or right of way was next revoked, but after a brief interruption, again conceded.

In neither instances, however, was the right of using *steam* as a propeller, conferred. This is a most material omission, fatal to the pretensions of the defendants to run and station their trains moved by that power. This privilege should have been expressly formulated. It is hardly necessary that the defendant Company could not, and did not, acquire the right to use steam, by any concession on the part of the New Orleans, Metairie & Lake R. R. Co. Such right could not be delegated, either specially or by an unauthorized consolidation of companies.

II.

The plaintiffs complain that the cars run daily and continuously in the night, at short intervals; that this causes noises and motions which disturb the comfortable enjoyment and affect the value of their property; that the engines emit odors, noxious vapors, which are exceedingly disagreeable to the senses, and that the use of the street or middle ground by said Company, in that manner, has become an intolerable nuisance which should be abated, and which has occasioned them damages, which they are entitled to recover.

Having reached the conclusion that, although the defendant Company was allowed by the City to extend its track to Carondelet street on the middle ground, still the City has not conferred on them the privilege

to run their trains, moved by *steam*, thereon; the legal consequence flowing therefrom is, that the unauthorized use of steam is a nuisance in contemplation of law, though perhaps not so in reality, of which the plaintiffs have a right to complain.

The right of way is, in terms, revocable, at the pleasure of the Council. The power of recalling or regulating it is in them. There can be no doubt that it will be exercised whenever they will deem it expedient to do so, in case a suppression be considered conducive to the public good.

From all the foregoing it results that, while the strip of land, known as the neutral ground, on Canal street was dedicated for a public use, its destination was not changed by the City; that, if it was altered, or modified to some extent, the change was accomplished with legal authority; that the plaintiffs, in any contingency, have no standing in Court to complain that the right of way and station was granted and the road laid; that the use of *steam*, on the space between Basin and Carondelet streets, being unauthorized, is a constructive nuisance, and that, as the Company has no authority to use steam, an injunction lies in the premises against it.

The evidence does not disclose a state of facts in which pecuniary damages can be allowed.

It is, therefore, ordered and decreed that the judgment appealed from be reversed; and it is now ordered, adjudged and decreed that there be judgment in favor of the plaintiffs, so far only as to allow the injunction prayed for, forbidding the defendant Company from using steam as a propeller on their tracks, between Basin and Carondelet streets, on Canal street in this City, and that, in other respects, the demand of plaintiffs be rejected, the defendants to pay costs in both Courts.

Fenner, J., recuses himself, having been of counsel.

Manning, J., concurs in the decree.

CONCURRING OPINION.

MANNING, J. I concur in the decree, but I go further than the opinion of the Court seems to warrant, and there are parts of it to which I do not assent.

That steam trains on that part of Canal street are a nuisance, offensive to eye, ear, and smell, disagreeable at all times, and intolerable in our climate for one-half of the year, should seem scarcely questionable. We are told the purest oil is used on the running gear and that it emits no smell; that anthracite coal is burned that gives a whitish

smoke perceptible only in early morning; that no whistles are blown, and bells only tapped. If, with all these precautions, the air is laden often with stench and smoke, and the clatter drowns all fainter sounds, what would be the lamentable condition of these plaintiffs if full rein were given to the steam train to expend all its capacity for annoyance. The evidence of the kind and extent of the nuisance produced by these trains is ample, but if it were less complete, how can anyone shut out from sight and hearing the rattling of cars over iron rails, the puffing of laboring engines, the bell taps that announce the going out and coming in of a long line of carriages every fifteen minutes of some days, noises which are prolonged into the night and until the small hours of the morning.

And what is the excuse for inflicting this perpetual nuisance upon the inhabitants of the very heart of the city? The promotion of trade and health! The promotion of trade by a pleasure train that has no freight, and the promotion of health by putting the terminus only three blocks away from its present situs. One hundred and seven firms and individuals sign a petition to the city council to continue this nuisance, a large number of them between the terminus and the river and therefore unaffected by it, and sign it with the same indifference and facility that they would sign a petition for the pardon of a criminal, or for the execution of a saint, and these assert the great advantages derived from running these dangerous trains exceed the trifling inconveniences resulting from them. The comfort, freedom from stench and noise, of home life, and the safety of pedestrians in an often crowded thoroughfare must be sacrificed because of the great advantage of selling a few dollars worth of goods!

It is said individual comfort and convenience must give way to the public good, but what is the public good? Is the promotion of the pecuniary interest of a private corporation the public good? Is the conferring upon and the enjoyment of valuable franchises by associated private individuals, the promotion of the public good? The overgrown power of great corporations almost always has its origin in the employment of catch-words that delude the popular imagination, and cast a glamour over what is hidden beneath. How far private rights are to be ignored in the pursuit of this *ignis fatuus*, which for the nonce is assumed to be the public good, does not yet seem to be clearly determined, but it is certain that the authorization of an act even by the legislature does not prevent it from being a private nuisance. Woods on Nuisances, 788. One has as much right to protection from noxious gases and mephitic odors transmitted through the air, as to protection

from a trespass upon his soil, and there is no good reason why courts should not guard the one as jealously as the other.

These considerations would be worthy of attention even if the defendant Company had the right to run steam trains over this part of Canal street, but it has none whatever. Apart from the dedication to public use of this central space, which the plaintiffs' counsel have presented with ingenuity, it appears the City sold the lots, or some of them, now owned by the plaintiffs, fronting on this street. This space was at one time converted into a promenade, with shelled walks, shaded by trees, and protected from the intrusion of vehicles by ornamental chains and posts. It is well stated in the opinion of the Court, as was said in French's case, 2 Ann. 87, these parties bought with reference to the reservation of this central space for public use, and where property has been thus set apart and enjoyed as such, and private and individual rights have been acquired with reference to it, it is an estoppel *in pais* which binds the original owner. Sarpy vs. Municipality, 9 Ann. 597.

It is of no consequence that the City acquired this central space after she had sold the bordering property. There is no reason why a municipal corporation may not be held to the same restrictions and responsibilities as a private individual in its contracts. It received for the property it sold a larger price, because in its front was a wide street which assured ventilation, the middle of which was not used for the passage of horses or vehicles, and it should not gain by the existence of a condition of its property which attracted and induced purchasers, and when it acquires the object which formed the attraction, so change its use as to destroy that attraction, and even convert it into a nuisance.

The right to run these steam trains is claimed under an Act of the General Assembly incorporating the New Orleans, Metairie & Lake Railroad Company, Acts 1869, p. 205, the defendant being the assignee and successor of the incorporators, and also under an Act of July 1, 1878, between the City and the defendant, wherein the right to run cars with steam dummy engines, is said to be recognized.

No such right is recognized by that Act. The use of a steam propeller was not contemplated at all, and it is the use of steam as a propeller of which the plaintiffs complain. The purpose of the organization is exhibited by the specifications of the contract with the City, and it was to construct and maintain a railroad within the City to be propelled by horse-power. It was a tramway rather than a railroad.

Unquestionably that was its original franchise, and it can only exercise a greater and different franchise by derivation of authority since the grant. It has none. The pretension that it acquired such larger franchise through purchase of the Metairie & Lake Road franchise, falls before the declaration of this Court that it is the State's prerogative to confer franchises, and they cannot be transferred without the consent of the grantor. Spanish Fort R. R. Co. vs. Delamore, 34 Ann. 1225; and to like effect, Thomas vs. R. R. Co., 101 U. S. 83.

Nor is the defendant's claim of a more satisfactory origin when it is attempted to be derived from the City Ordinance of August, 1876, granting permission to establish a stand for the cars on the neutral ground on Canal between Baronne and Carondelet streets, revocable at the pleasure of the Council. It was wisely revoked in June, 1880, and the stand was removed to Basin street, but the petition of the one hundred and seven, like the famous charge of the six hundred at Balaclava, won the day, and the obnoxious stand was reinstated in March, 1881.

The authority of the Council to confer this privilege upon the railroad is said to be derived from the charter of 1870, in force at the time of the grant, under that clause giving power to "regulate the proper government of carts, drays, etc., freight, locomotive, passenger and street cars, which run in the streets, and within the limits of the City."

The flimsiness of this pretence is apparent when it is considered that the power to *regulate the government* of railway cars can in no sense include the power to *grant a franchise.* The regulation of cars, etc., is simply an act of ordinary administration. The grant of a franchise is an extraordinary act—the exercise of a power inherent in sovereignty —a power obtainable only by a concession from the sovereign, the terms of which are always strictly construed.

Even if a municipal corporation has authority from the sovereign to grant a franchise, it cannot so exercise it as to create a private nuisance for which there is no redress. The legislative grant is not a protection against an action for damages resulting from the private nuisance. *A fortiori* is the defendant without protection and without excuse, since it has neither municipal authority nor legislative grant.

Rehearing refused.

No. 8954.

THE STATE OF LOUISIANA EX REL. W. S. BEHAN, MAYOR, ET AL. VS. THE JUDGES OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

When the Supreme Court is not in session, an application for any of the remedial writs may be entertained by the Chief Justice or any of the Associate Justices.

A provisional order for any such writs thus issued by any one of the Justices is valid and binding, as though it had emanated from the Court.

Such an order is not a judgment; it is valid without the concurrence of the majority of the Judges, and need not be supported by reasons.

The power to amove a corporate officer from his office for a reasonable and just cause, is one of the common law incidents of all corporations.

The general rule is, that courts are without power or jurisdiction to impede by preliminary injunction the usual functions of a municipal corporation.

A provision in a City Charter vesting the City Council with the power to try all impeachments of City Officers, the judgment only extending to removal and disqualification to hold any corporate office, is not unconstitutional as authorizing the exercise of judicial powers by a legislative or municipal body, but it is rather the exercise of a power necessary for its police and good administration.

Courts are powerless to interfere by injunction with a municipal council in the exercise of that power. An injunction thus issued is a nullity, and will be vacated by prohibition.

ON Application for Writs of Certiorari, Mandamus and Prohibition.

Chas. F. Buck, City Attorney, *Wynne Rogers*, Assistant City Attorney, and *J. R. Beckwith* for the Relators.

J. Ward Gurley, Jr. and *E. H. Farrar contra:*

I.

Courts have the authority to enjoin all illegal acts.

The power to impeach could not be bestowed upon the City Council. Constitution, Articles 14, 15, 80, 92, 196, 200 and 201; 31 An. 440; Cooley Const. Lim. 107, 211; People vs. Draper, 15 N. Y.; 32 An. 943 and 947; Story on Constitution, 796, 797, 800, 802; 11 An. 443; 6 Bush, Ky. R. 1; 3 Metcalf's R. 237; 28 An. 444; 19 Johnson, N. Y. 58.

II.

A suspensive appeal does not lie from an order granting an injunction. It is a matter of right. C. P. 304; 29 An. 869, 796, 57; 30 An. 213. An improvident order granting a suspensive appeal, where none should have been granted, may be rescinded. 32 An. 814; 33 An. 724; 22 An. 35.

III.

The supervisory control over the Civil District Court, and the power to issue thereto writs of Mandamus and Prohibition, is vested in the Supreme Court and not in a single Justice thereof. Constitution, Articles 89 and 90; C. P. 829, 841, 846 and 849.

The opinion of the Court was delivered by

POCHÉ, J. This litigation grows out of the following facts:

On the 11th of September, 1883, the Council of the City of New

Orleans preferred charges and specifications for gross neglect of, and refusal to perform, his duty, against B. T. Walshe, the City Treasurer.

The members of the Council then proceeded to organize themselves into a court of impeachment for the trial of said corporate officer, conformably to the provisions of the City Charter. Secs. 58 *et seq.*

But their proceedings were interrupted by a writ of injunction issued by Division E of the Civil District Court, restraining the Council from proceeding in the investigation of the charges preferred against the Treasurer, and prohibiting the Mayor of the City and other persons from interfering with said Treasurer in the possession and in the administration of his office.

The preliminary writ of injunction was granted at the instance of the Treasurer, and was predicated mainly on his allegation and on the District Judge's opinion, that the provisions of the City Charter which authorize the removal of city officials by impeachment by the City Council were in direct violation of the Constitution.

The parties thus enjoined, who are the relators herein, then applied for, and obtained, an order of suspensive appeal from the mandate of injunction, the said order having been granted by another Judge of the Civil District Court, acting in the absence, and in the place, of the Judge of Division E. The latter Judge, on resuming charge of his court, entertained and maintained an application for the rescission of the order for a suspensive appeal, which was alleged and held to have been inadvertently granted. An application of the relators for an order of suspensive appeal from the rescinding order just referred to was then overruled by the Judge of the lower court, whereupon relators applied to this Court for relief from the Judge's orders, alleged to be unwarranted in law and oppressive.

Their prayer for a writ of *certiorari* was declined; and it cannot be entertained, for the plain reason that the case is appealable, this writ being available only in cases where the suit is to be decided in the last resort by the subordinate court. C. P. Art. 857.

Touching the other writs invoked the following orders were made:

1. A provisional writ of prohibition, restraining the respondent Judge from enforcing the injunction which he had issued.

2. An alternative writ of mandamus commanding him to grant the order of suspensive appeal prayed for by relators, with a *proviso* that this writ was to take effect only in case of the dissolution, after final hearing of the writ of prohibition.

3. That the Judge show cause, on the first Monday of November, 1883, why the writs provisionally granted should not be made peremptory.

First. The point raised by the respondent Judge in his return questions the validity of the order granted, on the ground "that it was not issued by the Court, but was issued by only one of the Justices thereof, without consultation with any of the other Justices."

The position of the respondent Judge, as a guidance for the conduct of their tribunal, in dealing with remedial writs is, that under the provisions of Articles 89 and 90 of the Constitution, the Court alone, or at least a majority of the Justices concurring, could render a valid order for any of the remedial writs.

Article 89 provides that: "The Supreme Court and each of the Judges thereof, shall have power to issue writs of *habeas corpus*, at the instance of all persons in actual custody in cases where it may have appellate jurisdiction."

Article 90 reads: "The Supreme Court shall have control and general supervision over all inferior courts. They shall have power to issue writs of *certiorari*, prohibition, *mandamus*, *quo warranto*, and other remedial writs."

The two Articles must be construed in connection with the pre-existing provisions of the Code of Practice touching the nature, definition and scope of the writs in question, and providing the mode of proceeding in the application, the issuing and the trial of the same.

These rules of practice recognize and treat of two distinct steps or phases in the disposition of these writs. The first step is a preliminary or provisional order under which the subordinate court complained of, is apprised of the proceeding instituted with a view to test the validity of its action in the matters set forth by the relator. The second step is the final disposition of the relief sought by the complainant, after considering the return made by the respondent Judge.

The first phase in the proceeding involves the exercise of a power provisional and preliminary in its character, and, if not otherwise regulated, it is amply provided for by Art. 877 of the Code of Practice, which reads:

"The Supreme Court, as well as other courts, possesses the powers which are necessary for the exercise of the jurisdiction given to it by law, in all the cases not expressly provided for by the present Code."

The second or final act is the judgment of the court finally disposing of the controversy after full hearing of the parties, which judgment can be rendered only in open court, and cannot be rendered without the concurrence of three Judges. Const. Art. 85.

The order for a preliminary remedial writ is not a judgment or even an interlocutory decree: it adjudicates nothing, and confers no vested or irrevocable right. It is merely an incipient step towards a judicial

investigation of the matters and complaints urged in the application; it can be modified or recalled by the authority whence it emanates.

To confound it with a judgment which adjudicates on, and disposes of an issue, and finally settles a controversy, and for which reasons must be adduced under a constitutional requirement (Const. Art. 87) is a glaring fallacy repulsive to the legal mind.

Hence it is, that these Articles of our Code of Practice have been uniformly construed as meaning that the action of the Supreme Court, or the concurrence of the majority of its Justices, is not essential to the validity of a provisional order for a remedial writ; and that such a mandate has always been viewed in our jurisprudence in the light of an order entertaining the application, and directing that notice thereof be addressed to the party or parties complained of. The construction urged by the District Judge would strike with absolute nullity all such orders rendered otherwise than in open court.

Out of term time, during the vacation of the Court, the Justices have no power to meet as a Court, or to make and issue orders and decrees as a Court. Hence it would follow, as a logical deduction from his reasoning, that during such time the remedial writs which have been incorporated in the Code of Practice and engrafted in the Constitution, in order to secure a more speedy administration of justice, would be paralyzed and temporarily obliterated, and that the wrongs which they were intended to correct would be without remedy. Such a conclusion is abhorrent to common sense, as well as to justice.

But should it be contended that the language of the Constitution, which must prevail over the provisions of the Code of Practice is peremptory in requiring the action of the Court, or the concurrence of the majority of the Justices for the purpose of issuing a valid preliminary remedial writ, the argument is answered by the plain text of the Articles 89 and 90, which, as conceded by the District Judge, must be construed together.

Article 89 unequivocally confers the power to each of the Judges to issue writs of *habeas corpus* in specified cases. Now, Article 90, after creating the supervisory jurisdiction of the Supreme Court, continues the delegation of special powers begun in Article 89, and is couched in the following significant language:

"*They* shall have power to issue writs of certiorari, prohibition, mandamus, *quo warranto*, etc." The only grammatical construction which the sentence admits of, shows that the pronoun *they* refers to the subject: "the Supreme Court and each of the Judges thereof," in the preceding Article which treats of the same subject matter. Hence, it is apparent that the power conferred by the Articles of the Code of

Practice is not only maintained in the Constitution, but on the contrary that the power has been *ex industriâ* enlarged.

Heretofore, the remedial writs could be issued in appealable cases only. Now, under the newly created supervisory jurisdiction, they are available in cases where the judgment is final in the lower court.

The construction which we give to the provisions of the Code of Practice, which regulate the remedial writs, is not only sustained on reason and principle, but it has its support in judicial authority. The point was made by another zealous litigant more than thirteen years ago, and it was settled in the same sense in the case of the State ex rel. Southern Bank vs. The Judge of the Eighth District Court of New Orleans.

We quote the following language from that decision: "When, in the progress of a suit, a necessity arises for the application of these writs, and the Supreme Court is not in session, *ex necessitate rei*, the Chief Justice or the Senior Justice present should grant the provisional order. Any other interpretation of the law would do violence to the clear intention of the law maker and to justice."

The provisional order in this case was issued by the Senior Associate Justice, when the Court was not in session, and when he was the only Justice present in the State, and our conclusion is that the order emanates from a competent authority, then vested with the whole power of the Court *pro hac vice*, including the power of coercing obedience to its mandate in case of resistance or refractory conduct on the part of those to whom it was directed.

Second. The second question submitted by the respondent in his return involves the justification of his acts in the premises, and it presents for solution two distinct propositions:

1. The unconstitutionality of the legislation under which the Council proposed to accuse and try the City Treasurer, which was alleged and held to be a legal ground for the injunction granted.

2. That the subordinate court had jurisdiction of the subject matter; that its ruling therein could be reviewed on appeal only, and that therefore the writ of prohibition could not apply.

The alleged unconstitutionality of the proceedings is liable to two sub-divisions: 1st, that in organizing a court of impeachment, the City Council was usurping judicial functions, in violation of Articles 14 and 15 of the State Constitution; 2d, that the provisions of the City Charter on the subject of impeachment were violative of the Constitution, Articles 196 and 201, which had conferred to the judiciary department the sole power of removing municipal officers.

At the threshold of the discussion, we meet a question which over-

shadows the controversy, and that involves an examination of the power of the judiciary to interfere by injunction with the operations of a municipal corporation in the exercise of its administrative functions, and more particularly that of amotion of a corporate officer.

It is of the very essence of corporations that their only mode of acting is through their officers, whose acts are regulated by law, and by the acts of incorporation.

Now, as every illegal or wrongful act of a corporate officer, cannot always be reached by the slow process of judicial proceedings, which frequently afford no adequate relief in the premises, it follows, as a necessary consequence, that the removal of the recreant officer is the only protection of the corporate body against the recurrence of similar acts, and from the damages or injury resulting therefrom.

Without the power in the corporate body of removing such obstacles in the way of its operations, the wheel of the corporation would soon become so effectually clogged, that corporate life would be eventually paralyzed, if not completely extinguished.

Hence it is, that soon after the first institution of corporations, the judiciary was called upon to define the power of such bodies for self-purification and self-maintenance in connection with the acts of unfaithful officers. And from the very nature of things the problem was solved by applying the power of amotion. The remedy was at once prescribed and used, and under numerous decisions of the Courts of England and of our sister States, it has crystallized into the following well established doctrine: "The power to amove a corporate officer from his office, for a reasonable and just cause, is one of the common law incidents of all corporations." The right has been admitted in cases where the power had not been expressly delegated, either by general law, or by special statute. Dillon's Municipal Corporations, Sec. 240.

In the early case of Rex vs. Richardson, 1 Burrows, 539, Lord Mansfield said, in speaking of this power: "It is *necessary* to the good order and government of corporate bodies, that there should be such a power as much as the power to make by-laws." Lord Coke says: "there is a tacit condition annexed to the franchise which, if he breaks, he may be disfranchised."

A similar ruling had been previously made in Lord Bruce's case, 2 Strange Reports, 819, in which a contrary doctrine which had once prevailed was reversed. Rex vs. Liverpool, 2 Burr. 723; King vs. Lynn Regis, 1 Douglass' Reports, 158; Osgood vs. Nelson, 5 English and Irish Appeals, 636.

In the case of Neall vs. Hill et al., 16 California, 146, the Court, in

recognizing this doctrine, extended it to the declaration that the power of removal of a corporate officer is vested exclusively in the corporation, subject to a revision of its action by the Courts after removal.

In the case of King vs. Richardson, 1 Burr., Lord Mansfield held, that in the absence of an express grant of authority, the corporation had the incidental power to make by-laws to remove officers for just cause.

In applying these principles to the case under discussion we find a corporation controlled by a charter recently enacted by the legislature under its general powers, and with the express authority of a constitutional provision conferring to the General Assembly full power and authority to cancel the pre-existing Charter of the City of New Orleans, and to remit its inhabitants to another form of government, if necessary. Const. Art. 254.

And in the Charter enacted under this solemn sanction, we find that the inherent power of amotion of corporate officers by the corporation is expressly recognized in principle, and is unreservedly granted in fact.

In that legislation the corporation is not left to its own inherent powers to prescribe the mode of proceeding in such cases, or to define the causes of removal, but every needed detail is amply provided for, and the extent of corporate power and the path of corporate duty are clearly mapped out.

Hence, it appears clear to our minds that, in presenting charges against the City Treasurer, and in organizing for his trial, the City Council was proceeding to exercise a power not only inherent to its existence, but expressly delegated by law.

We therefore hold, both on reason and on abundant authority, that no court of justice had the legal power to interfere by preliminary injunction with the municipal council in the exercise of that franchise, one of its plainest and most essential administrative functions. The legality or constitutionality of its proceedings in such cases is amenable to judicial action under proper showing, like all ordinances of the municipal corporation, after the exercise of municipal discretion but not before.

The general rule that courts cannot impede, by preliminary injunction, the usual functions of a municipal corporation, rests on the most solid foundation, daily strengthened by judicial assistance, and is subject to very few exceptions, where, from the nature of the act to be performed, and of the consequent, inevitable and irreparable injury to public interest, the proposed action of the corporate body may be

reached and controlled by the arm of the judiciary. Dillon on Municipal Corporations, Secs. 94 and 908; High on Injunctions, Secs. 783 and 795.

In asserting this doctrine, the present Court, in the case of Harrison vs. City of New Orleans, 33 An. 222, said: "Municipal corporations are clothed with legislative powers, to be exercised according to their discretion, with reference to all subjects pertaining to their administrative functions. No injunction will lie to restrain a municipal corporation from passing or voting on any ordinance." Slaughter House Co. vs. Police Jury of Jefferson, Opinion Book 53, p. 546.

The principle is conceded by respondent, in so far as the act of the corporation subjected to the test is technically a legislative function, but he resists the application of the doctrine to the present controversy on the ground, which is his main reliance, that the Council, in organizing a court of impeachment, was assuming the performance of judicial functions.

The argument is untenable, its inevitable consequence would strip the corporation of its inherent power of amotion of corporate officers for just cause; as any deliberation by the corporate body on the conduct of an officer, with a view to his removal if found unfaithful, would be equally amenable to the objection of judicial usurpation with the mode technically described in the City Charter as an impeachment. Armed with that argument the simple police officer, charged with dereliction or neglect of duty, would successfully resist, by a preliminary injunction, any investigation into his conduct and official behavior, by the City Council, or by a committee acting under its authority.

The power of amotion, as hereinabove demonstrated to be an incident of every corporation, necessarily implies an examination into the alleged causes of removal, and a concurrence of the required number of the members of the board clothed with the power of amotion, in order to effect a removal.

Respondent's error consists in confounding this deliberation and this conclusion on the subject of removal with a judicial function, as contra-distinguished with other deliberations had and other conclusions reached by the municipal council on matters pertaining to its administrative functions.

The question has already been subjected to judicial test, and has received the following interpretation: "A provision in a city charter vesting the board of aldermen with the sole power to try all impeachments of city officers, the judgment only extending to removal and disqualification to hold any corporate office under the charter, is not unconstitutional as authorizing the exercise of judicial powers by a

legislative or municipal body, but it is rather the exercise of a power necessary for its police and good administration." Dillon on Municipal Corporations, Secs. 200, 244; People vs. Bearfield, 35 Barbour N. Y. 254.

The learned author just quoted refers to a decision of our own Supreme Court, which is very aptly in point. State vs. Ramos, 10 An. 420. The opinion in that case is a complete refutation of respondent's argument on this point, and unequivocally asserts the doctrine which we have just quoted.

The provision touching the limited effect of the impeachment, in the present Charter, reads: "Judgments in cases of impeachment shall not extend further than removal from office and disqualification from holding any office under the City Charter, etc." Sec. 62 of Act 20 of 1882.

A strenuous attempt is made to establish a difference between that case and the present controversy, founded on the discrepancy on this subject, between the provisions of the Constitution of 1852 then in force, and those of the present Constitution. Art. 92 of the latter contains a delegation of powers identically similar to those enumerated in Article 124 of the organic law of 1852, on which the Court justified the power of impeachment conferred in the City Charter then in force.

Respondent further contends that the restriction in Article 197 of the present Constitution is not found in the Constitution of 1852, or in any previous Constitution of this State, and seeks, for that reason, to avoid the effect of the decision in the Ramos case. The provision reads: "The House of Representatives shall have the sole power of impeachment." The argument is answered by the preceding considerations in this opinion, which go to show that the power delegated in the present City Charter is not the technical impeachment which the Constitution treats of, but is merely a definition of the causes of removal under the inherent power of amotion, and a prescription of the mode of proceeding in such matters.

The whole argument is completely demolished by the following reasoning on this matter of impeachment in the Ramos case: "We think that in this enactment the legislature only gave to the city government such powers as are proper for its police and good administration, and that no Article of the Constitution was invaded thereby." The corresponding provision on the subject, in the Constitution of 1852, is as follows: (Art. 85) "The power of impeachment shall be vested in the House of Representatives." The great difference between the two provisions, so confidently invoked by respondent, is not easily discerned.

We, therefore, feel safe in concluding on this point, that the immunity of the City Council from judicial interference in the exercise of its inherent, as well as delegated power of amotion, is far from being one of the recognized exceptions to which we alluded above; but that it is one of the very functions which should be held free from such interference.

In the recent case of People ex. rel. Dougan vs. District Court of Lake County, in the Supreme Court of Colorado, (Law Reporter, October, No. 15) this principle was pointedly asserted and enforced. The City Council had been prohibited by the District Court from proceeding to try the City Solicitor on charges preferred against him, until further orders from that Court, when application was made for relief by prohibition in the Supreme Court.

That tribunal held: "The examination of charges preferred against the City Solicitor, finding him guilty of malfeasance in office, and removing him therefrom by the City Council, was not the exercise of judicial power." Hence, the Court held that "the District Court had no jurisdiction to control the action of the City Council, and that this fact appeared sufficiently upon the face of the petition presented to it; and it follows that its order, directing the City Council to desist from further proceedings, was absolutely void."

We reach a similar conclusion concerning the injunction issued by the respondent Judge in our case; and we hold that the preliminary injunction, which paralyzed the administrative functions of the City Council of New Orleans, is an absolute nullity. High on Injunctions, Sec. 786; Pullman vs. Meyer, 54 Barb. N. Y.

It is worthy of note that in our case, no other relief was asked by the City Treasurer, but an injunction intended to screen him from a trial of the charges preferred against him, and from any interference with his possession of the office which he holds.

This brings us to the consideration of respondent's last proposition, that the wrong complained of by relators is at most an erroneous judgment, and does not justify the use of the writ of prohibition, which is intended by law only to test the jurisdiction *vel non* of the subordinate court.

In our opinion, the word *jurisdiction* implies something more than technical jurisdiction *ratione materiæ et personæ*, as contended for by respondent. The term is defined, from its etymology and derivation, to mean "a speaking of justice or of right." Wells' Jurisdiction of Courts, p. 1.

It therefore implies the power or authority in law to grant the full relief prayed for; and it must, of necessity, imply the scope or

power to reach and hold the persons or parties to be affected by the particular decree to be issued.

But it is fully demonstrated that a city council in the exercise of its inherent or delegated power of amotion of one of its officers is beyond the reach of the injunction process of courts.

Hence, it follows, that a writ thus issued is null and cannot be enforced, and that the proper remedy of the parties, against whom it is directed, is held to apply to a court of competent appellate or supervisory jurisdiction for relief by way of prohibition, in order to restrain the subordinate court from attempting to enforce a void order, involving an illegal usurpation of authority and jurisdiction by the inferior tribunal.

In the case of the State ex rel. Liversey vs. Judge, 34 An. p. 741, this Court held that a writ of this nature, issued by a court having no power to grant such an injunction, is an absolute nullity, and that the condemnation of defendants for contempt of such writ, falls with the injunction the moment such nullity has been pronounced by this Court, and a writ of prohibition, being considered as the proper remedy, was issued in the premises. This doctrine is in perfect accord with the principle announced in the Colorado case just quoted.

It has been held, and we endorse the ruling that, "The province of the writ (of prohibition) is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but it also extends to cases where such tribunal, although rightfully entertaining such jurisdiction of the subject matter in controversy, has exceeded its legitimate powers." High's Extraordinary Legal Remedies, Sec. 781; Appo vs. People, 20 N. Y. Reports, 531; Sweet vs. Hulbert, 51 Barbour, 513.

We are therefore clear in our conviction that, in this case, the District Court has wrongfully exceeded the bounds of its jurisdiction, and that the proper and only efficient check is by the writ of prohibition.

This view of the controversy obviates the necessity of passing on the alleged unconstitutionality of the City Charter on the subject of impeachment, which will be disposed of whenever it comes up in a proper proceeding.

Under these conclusions, and under the terms of our provisional order, the writ of *mandamus* prayed for is stripped of all practical effect, and it must therefore be ignored.

It is therefore ordered and decreed that the alternative writ of *mandamus* herein be dissolved; and that the provisional writ of prohibition issued herein be made peremptory at respondent's costs.

No. 8214.

THOMAS J. HICKMAN ET AL. VS. MARY P. DAWSON ET AL.

A legal assessment is essential to the validity of a tax sale, and where that is wanting the sale will not be protected by the prescription of two, three and five years. Such sale, however, being made by competent authority, where no nullity is patent on the face of the deed, the purchaser cannot be held a purchaser in bad faith, but is entitled to be reimbursed the legal taxes paid, and for useful improvements. Previous decisions reaffirmed.

Parol evidence is inadmissible to prove the assessment and payment of a special tax, where it is not shown that there exists no written evidence of said facts.

APPEAL from the Eleventh District Court, Parish of Natchitoches. *Pierson*, J.

Chaplin, Drauguet & Chaplin for Plaintiffs and Appellants.

Watkins & Scarborough for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. This is a petitory action instituted by the plaintiffs, as heirs of Mrs. M. E. Blanchard, for the recovery of the plantation described in their petition, situated in the Parish of Natchitoches, known as the Gaiennie plantation.

The defendants oppose to their demand a tax sale of the property, made in July, 1872, to Dr. Thomas H. Patterson, under whom they claim.

There have been two trials of the case in the District Court, and this is the second appeal to this Court. In the first trial the District Judge excluded evidence impeaching the tax title referred to, and rendered judgment for the defendants. The judgment was reversed and the case remanded for another trial, this Court holding that the excluded evidence should have been admitted. On the second trial there was judgment decreeing plaintiffs owners of the land, setting aside the tax sale, but allowing the defendants the value of the improvements made on the property, and the legal taxes paid by Patterson at the time of the sale, and since by defendants during their possession. From this judgment both parties have appealed.

1. The property in controversy belonged to the succession of Marie Emma Blanchard when sold at tax sale at the date mentioned, and the plaintiffs are her legal heirs.

Many nullities were urged against the tax sale. It is only necessary to notice one of them.

Though the property belonged to the succession of Mrs. Marie Emma Blanchard, as stated, it was never so assessed. In fact, it does not appear to have ever been assessed to her whilst living, though she

owned the property from 1860, having acquired it at probate sale of her father's estate. During her lifetime the plantation in question was assessed to Mrs. E. A. Blanchard, and was thus advertised to be sold, though the tax collector's deed stated that it was sold as the property of the estate of Mrs. E. A. Blanchard.

Under this state of facts it is manifest that such an assessment was equivalent to no assessment at all, and that the plantation in controversy, then the property of Mrs. Marie Emma Blanchard's succession, was sold virtually without any assessment whatever. Stafford vs. Twitchell, 33 An. 526.

Such a sale is not protected by the prescription pleaded, by reason of this radical defect: the want of a legal assessment. This question of prescription was really determined when the case was before us on the first appeal, and this was in conformity to prior adjudications of this Court. 15 An. 15; 32 An. 912.

The defendants, however, charge that this omission to assess the property against the true owner and the error in the name, was through the fault of the agents of Mrs. M. E. Blanchard, and for this reason cannot be invoked to invalidate the sale; and cites the case of Lane vs. Succession of Mauh, 33 An. 587, in support of the proposition.

It is sufficient reply to this to say, that the evidence in the record does not show the alleged agents were in any manner responsible for the omission to assess to the true owner, or for any mistake or error in the name of the owner. There is no act proved on their part to establish such responsibility, and, in fact, we find no proof of any such agency, or of any authority on the part of the alleged agents to represent Mrs. Blanchard in any respect or for any purpose whatever.

2. Whilst the tax sale must be held a nullity for the want of this essential requirement, yet the sale having been made by competent authority and it having been held by this Court in the first appeal, quoting the language of that decision, "that the defects or elements of nullity charged against the tax deed are *not patent* on its face," we conclude, in accordance with several adjudications of this Court on the same question, that the purchaser at the said sale was a possessor in good faith and entitled to be reimbursed for useful improvements on the property, and legal taxes paid by him. Miller vs. Montague, 32 An. 1293; Guidry vs. Broussard, 32 An. 924; Stafford vs. Twitchell, 33 An. 520; Hopkins vs. Daunoy, 33 An. 1124; Eldridge vs. Tibbits, 5 An. 380; Wederstrandt vs. Freyhan, 34 An. 705.

3. As to improvements.

The question as to the value of the improvements on the property,

under the conflicting testimony on the subject, we have found it no easy task to solve.

As stated, the Gaiennie Plantation, in controversy, was purchased by Mrs. Blanchard in 1860, at the sale of the property belonging to the succession of her father, for $51,000. The amount of her interest was $17,000, and for the residue of the price she gave her promissory notes to the co-heirs, which, after the war, in 1866, were reduced, but were never paid. She occupied the property for about one year and a half or two years, in 1862 and 1863, and then abandoned it, and never again occupied it up to her death. After she left the plantation it was exposed, during the late war, to the depredations of both armies. The buildings, fences, etc., were almost totally destroyed, so that at the termination of the war, the property was almost a complete wreck, and so remained, with the exception of a small enclosure and a few patches cultivated up to the tax sale. It was sold for the taxes of 1867, 1868, 1869, 1870 and 1871, and bought in by T. H. Patterson on the 6th July, 1872, for $4,218.80, under whom the present possessors, defendants, hold.

The improvements made on the property, after the purchase, were considerable and of a substantial character, consisting of a dwelling house, ginhouse, with steam engine and other fixtures, cabins, stables, about four miles of plank fencing, enclosing several hundred acres in cultivation.

These improvements were appraised by three persons, represented as being intelligent gentlemen of the neighborhood, planters and merchants, at $10,130.

We quote from the testimony of one of these witnesses, to give an idea of the character of the improvements, and the witness' capacity and opportunities for estimating their value:

"I was aware of the condition of the place at the time of the tax sale. It was then in a very bad condition. There was very little land fenced in, and the houses in a bad fix. There was no ginhouse or residence on the place; both had been destroyed. Hardly forty acres were under fence at that time. * * I know the condition of the place now. * * We examined the buidings and improvements enumerated in the bill of particulars. * * Have lived in the neighborhood since 1853, being a merchant and planter. I have experience in business as merchant and planter, and am well acquainted with the value of improvements and repairs, having had a great deal done on my own plantation. Have had improvements of a similar character made on my place, and make the estimates from my own knowledge and experience."

The other appraisers, we gather from the evidence, were men of like

experience, and possessed equal facilities for appraising the property. On the contrary, we find an estimate in the record by two workmen who built some of the houses, of $4,331.50, which embraces the same improvements, less the ginhouse, machinery, etc., which were valued by the first named appraisers at $3,200.

The Judge *a quo*, who had the case under advisement for some time, and doubtless gave the evidence the most thorough consideration and upon knowledge of the witnesses testifying before him in open court, afforded him an opportunity of weighing the evidence and forming a conclusion touching the value of the improvements which this Court does not possess, adopted the estimate made by the three witnesses first mentioned, deducting therefrom $800 for the ginhouse, which had been partially destroyed by a storm. We cannot say that the Judge erred in his conclusion. Our own examination of the evidence rather confirms us in its correctness.

4. Taxes.

There is a wide difference between counsel of the parties respecting the amount of taxes due on the property before and subsequent to the tax sale; and there is evidence in the record, documentary and oral, to sustain, to some extent, the respective opinions of each. We have the regular assessment rolls, the delinquent lists, and testimony of experts, none of them in exact accord and making it difficult to arrive at a satisfactory conclusion. The discrepancy between the assessment rolls and the delinquent lists is owing to the fact that, in the former, some of the taxes are not carried out or extended in the roll, which is done and appear on the latter.

With a view to ascertain the amount of the taxes for all these years, from 1867 to 1881, inclusive, an expert was appointed by the Judge, with consent of both parties, to compile and report a statement of the taxes from the evidence in the case. This expert had been in the tax collector's office since 1868, and is the present tax collector. Another statement or compilation of the taxes appears in the record from another party who, for many years, was the tax collector or deputy tax collector for the parish, and whose testimony on the subject was also taken. We think both statements are properly in evidence, although the right of one of them to appear in the record is questioned.

From these statements the conclusions of the Judge *a quo* are evidently largely drawn, but the aggregate reached by him is not as large as the total amount of the taxes shown by either statement referred to. All penalties and costs were wholly excluded from the Judge's calculation, as appears from a memorandum of his opinion on file. He also

reduced the Parish tax for the year 1872 to 1876, inclusive, to conform to the State tax for those years under the decisions. 29 An. 1; 33 An. 490.

In reviewing the Judge's statement on this point, we can detect but one error, and that was in relation to the special parish taxes for 1872 and 1873, aggregating for both years $1,469.70. There is no evidence whatever of any assessment of this tax, or any authority for its collection, except the testimony of the ex-tax collector, which was objected to on the ground that it was not the best evidence of the assessment and payment of the tax, which objection should have been sustained and the testimony on that point rejected. Cooley on Taxation, 28-45.

5. Rents.

There is much conflicting testimony respecting the value of the rents and revenues of the property. The Judge properly allowed the plaintiffs to recover the rent only from judicial demand. He fixed it at $750 per annum, for 1879 to 1882, inclusive, for the rent of the plantation on the left bank of the river, aggregating $3,750 for those years, and in addition thereto, $325, for two years' rent of the right bank. We think the estimate a liberal one, and of which the plaintiffs have no right to complain.

The Judge, also, very properly allowed the plaintiffs a credit of $300 for old rails and brick on the place, used by the defendants.

This completes our review of all maters embraced in this appeal. On account of the voluminous record, and the great mass of unsatisfactory and conflicting testimony, an examination of the case has occupied much time, but it has been thorough and exhaustive, and the conclusion we have reached, we believe, does substantial justice between the parties.

The judgment of the lower court allowed the defendants $11,364.58, on their reconventional demand for improvements, taxes, etc., after giving the plaintiff credit for rents, etc. This balance should be reduced by $1,469.70, the amount of the special tax we find improperly charged against plaintiffs, as above stated, which should have been rejected as of non-suit, leaving the true balance against them, $9,894.88.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be amended by decreeing the balance due by plaintiffs on the reconventional demand to be nine thousand eight hundred and ninety-four dollars and eighty-eight cents, with legal interest from date of judgment of District Court, and for the difference between this amount and that awarded by the judgment of the lower court, this difference being $1,469.70, the right of action is reserved, and the judgment, as thus amended, affirmed, defendants to pay costs of appeal.

Manning, J., takes no part.

No. 8048.

R. F. MONTGOMERY, MRS. C. GULLIFER, SUBROGEE, vs. G. H. KOESTER.

The rule of our law, as well as of the common law, is, that he, who owns and keeps a dangerous animal knowing it to be such, is bound, at his peril, to keep him up safe from hurting innocent persons, and if, for want of sufficient care, the animal escape and do injury, the owner is liable.

The *scienter* may be established by attendant circumstances without necessity, in all cases, of proving prior cases of injury.

APPEAL from the Fourth District Court for the Parish of Orleans. *Houston*, J.

D. C. & L. L. Labatt and *A. Smith* for Plaintiff and Appellee:

1. The owner of a dog which inflicts a wound upon a person walking upon the public highway is responsible in damages for such injury (C. C. 2321); and this holds whether the injury resulted from the negligence of the owner himself or from that of his agent or servant. C. C. 2316, 2317.
2. Knowledge on the part of the owner of the dangerous character of the dogs is to be presumed from the fact that he kept the dogs chained in the day time and loosed them at night; and from the fact that the dogs were kept to guard and protect his premises and property. Buckley vs. Leonard, 4 Denio, 500; Sherman and Redfield on Negligence, Section 191.
3. The owner of an animal is bound so to keep him that he shall not commit injury. When, therefore, such an animal does damages the owner is liable, though it be shown that it never before evinced any fierceness. Besazzio vs. Harris, 1st Foster and T. *nisi prius*, p. 92; 1 Com. (N. Y.) 515; 8 Barb. (N. Y.) 630; 38 Barb. (N. Y.) 14; 14 Cal. 138; Addison on Torts, old ed., p. 135.
4. In the assessment of damages not only the mental and bodily suffering are to be taken into consideration, but also the trouble and expense to which plaintiff has been subjected by the wrongful act of defendant It is proper to take into account, as part of the expenses, the reasonable fees of attorneys. 29 An. 218; 5 An. 5, 21, 22; Greenleaf Evidence, Vol. 2, p. 280, Sec. 267.
5. Defendant having gone into the trial of a cause on the merits, without having pleaded his exception, notwithstanding the fact that he had ample time subsequent to the notice of subrogation, the exception comes too late; and not having demanded a decision on the exception, it is considered as waived and abandoned. 6 An. 533; 11 An. 689, etc.

H. P. Dart for Defendant and Appellant:

EXCEPTION.

1. Defendant's right to raise exceptions to the capacity, etc., of a subrogee who becomes such after issue joined with original plaintiff is not affected by that fact.
2. An exception to the want of authorization and right of a married woman to stand in judgment is peremptory, because it shows "a total want of legal right or authority to sue," and it may be urged at any stage of the cause. 4 R. 174; 17 L. 236; 4 N. S. 437.
3. The husband's authorization to sue must be filed before proceeding to trial on the merits, or he must appear with her. 22 An. 204; 21 An. 576; 25 An. 193. It is sufficient that she be capable of standing in judgment when judgment is rendered. 2 R. 13; 4 L. 259; 10 An. 505; 26 An. 590, 809; C. P. 320, 321. The statute is prohibitory and such an authoriza-

tion filed subsequent to judgment is not sufficient. 15 An. 182, 303; 12 An. 147; 1 An. 260; C. C. 121, 124.

4. The wife (her husband living) cannot prosecute community claims. C. C. 2402; 10 An. 310; 15 An. 119; 20 An. 532; 24 An. 521, 295.
5. Personal actions of the wife are under the sole control of the husband. C. P. 107; 9 L. 350; 12 An. 333; 29 An. 215.
6. This Court will not permit litigants to question here titles whose validity they have maintained in the court *a qua*.
7. A judgment rendered in favor of a married woman unauthorized or incapacitated must be reversed and the case remanded.

MERITS.

1. Burden of proof is upon plaintiff in actions *ex delicto* and he must make his case certain; a probable case will not satisfy the exigency of the law. 16 An. 121.
2. Dogs are property under the laws of this State, and it is lawful to keep same, (Act 148 of 1858; R. S. 1201,) provided they be not public nuisances. City Ordinance, p. 142.
3. Statements or conversations by or with the wife should not be received for or against him in an action against the husband.
4. It being lawful to keep dogs, if the same are so kept with extreme care, and, through no fault or negligence of defendant, they get out in the night time and do injury, such injury is an accident, from which no liability results. Wait's Actions and Defenses, 1, 160, and authorities there cited; Shawhan vs. Clarke, 24 An. 390.
5. A dog is *mansuetæ naturæ*, and the owner is responsible for injuries by it committed only when it is shown to be accustomed to injure persons or property to the knowledge of the owner. 1 Wait, Actions and Defenses, and authorities; 1 Addison on Torts, 229; 2 Hilliard on Torts, 81, 82; 7 Ala. 171; 22 Ala. 571; 22 Ill. 143; 21 Vt. 378; 4 Denio, 127, 177, 500; 13 Johnson, 339; 3 Keyes, (N. Y.) 269-70; 4 H. 363; 4 Carr. & Payne, 297; 19 Penn. 359. The same principle controlled Rome and Israel. Exodus XXI, 29-36; Cooper's Inst., Lib. IV, Tit. IX. Vredenburg vs. Behan, 33 An. 634.

ON THE EXCEPTION.

The opinion of the Court was delivered by

FENNER, J. This is a personal action brought by Montgomery, in his own name and right, against the defendant.

The latter had filed answer and the cause was at issue.

Thereafter a motion was filed, suggesting a transfer by Montgomery to Mrs. Gullifer, and an order was entered recognizing her as subrogee.

The case was taken up for trial on 25th May, testimony taken on that and various subsequent days, to which the cause was continued, until 15th June, when defendant filed an exception to the effect that "Mrs. Gullifer, subrogated, is a married woman and hath averred and proved no facts which warrant the Court in rendering judgment in her favor, and she is absolutely without capacity to stand in judgment. Wherefore, he prays that this exception be sustained, and plaintiff's suit be dismissed with costs."

Manifestly, this exception does not go to the dismissal of the suit, which was properly brought and at issue before the subrogation took place. The exception simply attacks the subrogation and the rights

of the subrogee thereunder. In absence of any interest proved, or even asserted in the defendant, the validity and effect of the subrogation seem to be matters between plaintiff and his subrogee, and not concerning the defendant. The suit proceeded in the name of the original plaintiff; the judgment, by its terms, is "in favor of plaintiff, Robt. F. Montgomery, Mrs Catherine Gullifer, subrogated;" satisfaction of the judgment will securely discharge the defendant, and he has no other interest in the matter.

The authorities quoted as to suits improperly *brought* in the name of the wife do not apply to such a case.

ON THE MERITS.

The action is brought under Art. 2321, R. C. C., for damage caused by dogs belonging to defendant, in attacking and biting the plaintiff.

The facts are, that plaintiff, while walking in the public street at night, on arriving opposite an alleyway opening into defendant's premises, was attacked by two dogs and injured as charged.

The evidence satisfies us, as it did the Judge *a quo*, that the dogs which did the injury were defendant's.

These were watchdogs kept by defendant for the protection of his premises, and their dangerous character and knowledge thereof by defendant may be inferred from their size, their actual conduct, the admitted purpose for which they were kept, and the very care exercised in their custody; for it appears from the testimony offered by defendant, that his practice was to chain up the dogs every morning at daylight and to loose them only at night.

We think this sufficient to charge him with the *scienter*. 1 Thompson on Negligence, p. 203, § 17 and cases there cited.

Defendant's right to keep the dogs is not questioned. They were necessary and proper for the protection of his premises in their situation on the outskirts of the City. If, while loosed at night, they had bitten a person trespassing, or even negligently coming, upon his premises, defendant would not have been liable. But plaintiff was wending his way homeward on a public highway when attacked, and was not guilty of the slightest fault or contributory negligence,

It was defendant's clear duty in loosing his dogs at night, for his own advantage and protection, to see to it that they should not escape and injure innocent passers on the street, and to that end, to exercise the highest care.

How the dogs got out is not shown, but the evidence is that the gate opening from defendant's premises on the alleyway was not locked, but was fastened with a simple latch which might be opened by any

one from the inside or outside. The risk of the gate's being opened and left open by careless or mischievous persons and the consequent escape of the dogs was one the consequences of which must be borne by defendant and not by the innocent plaintiff.

The rule at common law is ancient and well settled that one keeping a dangerous or mischievous animal, with knowledge of its propensities, "must, at his peril, keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer in damages." 1 Hale's Pleas of the Crown, 430; May vs. Burdett, L. R. 9 Q. B. 112; Cox vs. Burbridge, L. R. 13, C. B. 438; Flecher vs. Rylands, L. R. 1 Exch. 265, (S. C.); Rylands vs. Flecher, L. R. 3 H. L. 230.

Our law certainly does not afford a more lenient rule.

The French Courts and Commentators, in applying Art. 1385 of the Napoleon Code, corresponding to our own Article 2321, enforce the same doctrine.

Marcadé, in his usual trenchant style, says: "Of two things, one: either the owner has not taken all the precautions which prudence required, and is thus in fault; or the animal is so vicious that all imaginable precautions to prevent it from injuring are of no avail, in which case the owner is in fault merely by keeping such an animal." Marcadé on Art. 1385, No. 1; 8 Demolombe, Traité des Contrats, No. 654; 5 Larombière, on Art. 1385, No. 3; 3 Aubry et Rau, § 418, p. 559; 2 Arcollas, Droit Civil, p. 981.

The exceptions to the rule of the owner's liability are cases of *vis major*, contributory fault or negligence on the part of the person injured and the like explained by Demolombe, within none of which, however, is this case embraced. 8 Demolombe, No. 650.

The French authorities go to the further extent of holding that the character of the animal and the knowledge of its vicious propensities by the owner, are of no consequence in determining the liability of the owner.

We have no occasion in this case to determine whether we should follow them to that extent.

As we have shown, both the highest English and French authorities agree on the doctrine on which we rest this case, and we feel safe in applying it.

Nothing remains but the *quantum* of damage allowed by the Judge *a quo*, viz: five hundred dollars. The evidence does not establish to our satisfaction that this allowance is so excessive as to justify us in disturbing it.

Judgment affirmed.

No. 8664.

A. Erman vs. Sun Mutual Insurance Company.

A discrepancy, even if it be material, between the statements of the assured under oath in his proof of loss, and those made at the trial, does not constitute the false swearing that works a forfeiture of all claim under a policy of insurance; nor does an over-statement of the value of the property work such forfeiture, for a great difference of opinion upon values may well co-exist with perfect honesty of all the persons differing. The assured may have sworn to what he believes to be true, but which nevertheless is false, and his policy would not thereby be forfeited. To work such forfeiture, the assured must knowingly and intentionally, and therefore fraudulently have sworn with the intent to deceive the insurer and get from him a value falsely put upon the property.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe*, J.

Braughn, Buck & Dinkelspiel for Plaintiff and Appellant:

1. If there is a discrepancy between the statement of loss and the statement testified to at the trial, it does not thereby follow that the claimant has been guilty of fraud or false swearing, for the statements made in the proof of loss may have been honestly, though erroneously made. 14 Wal. 375; 3 Bis. 106; 4 Daly, 96; 43 Barber, 400; 50 Ill. 120.
2. Swearing must not only be false, but it must be wilfully and knowingly done, with intent to cheat the Company. 43 Pa. 350.

Leovy & Kruttschnitt for Defendant and Appellee.

The opinion of the Court was delivered by

Manning, J. The suit is for the recovery of $1,437.57, alleged damage to a stock of goods and house at Morgan City, occasioned by fire on April 2, 1881. Besides the general issue, the defendant pleads in bar the forfeiture of all claim under the policy by reason of fraud and false swearing.

The false swearing that works a forfeiture of all claims under a policy of insurance is not a discrepancy, even if it be material, between the statements of the assured under oath in his proof of loss, and those made at the trial; nor an over-statement of the value of the property, for a great difference of opinion upon values may well co-exist with perfect honesty of all persons differing. The assured may have sworn to what he believed to be true, but which nevertheless was false, and his policy would not thereby be forfeited. He must knowingly and intentionally, and therefore fraudulently have sworn, with the intent to deceive the insurer and get from him a value falsely put upon the property. May on Insurance, § 477; Ins. Co. vs. Werdes, 14 Wall. 382.

The policy was for $1,000 upon a wooden building and $3,000 upon the stock therein. The damage sworn to is $75 to the building, and $1,362.57 to the goods.

The fire was extensive. Many buildings in the town were burnt to the ground, and others caught from flying sparks and burning shingles which a strong wind scattered hither and thither. The plaintiff's store thus caught fire. The dry roof ignited in several spots. Water was thrown upon it from buckets. The persons who ascended to the roof, and who were chiefly instrumental in extinguishing the flames, were witnesses at the trial. The plaintiff was very energetic in assisting also. The building was saved with difficulty. "The roof was rapidly burning in several places," said a witness; "the water thrown upon it ran down into the store and wet all the goods there, and a great deal of the stock was damaged in consequence." *Per contra*, the man sent down by the insurance company as adjuster disbelieved the leakage from above, and flatly charges Erman with having wetted the goods himself, and thinks $100 the maximum of damage.

There is not a particle of testimony to substantiate this theory. When a town is on fire and the flames are spreading, and men are running pell-mell to buildings threatened or aflame, and mounting upon ladder and parapet with buckets to hurl their contents athwart the roof, they do not throw the water as gently as if they were laving a lady's fingers. Against the theory that Erman wetted the goods on purpose to lay a claim for greater damage ought to be opposed his good character. Every one of his fellow townsmen who was examined was asked about his reputation for honesty and veracity, and they all concurred in saying it was as good as any man's in that community. They must be a bad lot if he, who is as good as the best of them, could do such a villainous act as the defendant's adjuster attributes to him. The proof of the plaintiff's good repute accumulated so fast that the defendant put a stop to further inquiry by putting on record the admission that his reputation for truth and veracity in the community in which he lives is good beyond doubt.

Yet it is argued that he has sworn falsely because he has three several times stated the sum now claimed is: 1, the amount of damages sustained by him; 2, the cost price of the goods damaged; 3, the value of the goods in their damaged state. Of course, that cannot be true, but it is apparent from the man's verbiage that he does not speak with accuracy and is not an adept in the use of our tongue. Other witnesses testify to the damage, and it would not be just to disbelieve the plaintiff entirely and fix upon him the stigma of deliberate perjury, because he cannot express himself with the lucidity and precision characteristic of the counsel who presses upon us this argument. His testimony does not read as if he were consciously falsifying. His blunders can be more justly attributed to other causes than that.

But he does say that the item of $630 for clothing is the full value of the goods, and the damage done to them is seventy-five per cent., and as the other items are lumped with that to make the sum sued for, the damage to each of them must be in the same proportion. He admits having sold $150 worth of the damaged goods. We state the figures thus:

Sum total of goods damaged	$1,362 57
Less 25 per cent.	340 64
	$1,021 93
Sold	150 00
	$ 871 93
Add damage to building	75 00
	$ 946 93

which we find as the amount of his damages.

Therefore it is ordered and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiff do have and recover of the defendant the sum of nine hundred and forty-six dollars and ninety-three cents, with five per cent. per annum interest thereon from June 15, 1881, and the costs of both Courts.

No. 8605.

J. O. HALPHEN vs. ZUBERBIER & BEHAN.

The appeal taken by a defendant cast in a suit apparently appealable, will not be dismissed for want of jurisdiction by the appellate court.

Equity demands that he should not suffer from the inference which he was authorized to draw, in that regard, from the nature of the cause of action and prayer.

A consignor is entitled to recover from his consignee the proceeds of shipments made to him, and which were passed, without his authority, to the credit of a third person.

Damages will not be allowed such consignor for non-payment of his drafts, where no evidence is adduced in support of such claim.

APPEAL from the Civil District Court, for the Parish of Orleans. *Tissot*, J.

M. Voorhies for Plaintiff and Appellee.

A. B. Philips for Defendants and Appellants.

The opinion of the Court was delivered by BERMUDEZ, C. J.

No. 8892.

THE STATE OF LOUISIANA vs. EDWARD ALIAS VALMORE RECTOR.

An objection made to the time of drawing the jury, without charging fraud or wrong, as required by Section 10 of Act 44 of 1877, cannot be considered.

The authentication of the clerk to the copy of an indictment extends to the body of the instrument, and to the indorsement thereon, where both are in the hands of the attesting deputy.

The Statute, R. S. 992, does not expressly say: that the list of jurors to be served on the accused shall be attested by the clerk under his official signature. Where the list issued and admitted to have been served, is a newspaper clipping, which bears the impress of the seal of the court, and which ends with the words: *a true copy*, followed by the printed name of the deputy clerk; where no complaint is made that the list is otherwise defective, where the list is truly an exact copy of the original, and where there is no injury shown, substantial compliance with the law cannot be denied.

The looseness with which the documents were issued by the clerk is censurable.

Oral testimony is admissible to prove the contents of a dying declaration, *first* proved to have been lost.

APPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Sherburne*, J.

J. C. Egan, Attorney General, for the State, Appellee.

Defendant unrepresented in this Court.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant, indicted for murder and convicted, appeals from the sentence of death passed upon him.

The record contains three bills of exception.

The *first* relates to the time at which the jury was drawn.

The *second* refers to the irregularity of the copy of the indictment and the list of jurors served, and to the irrelevancy of oral testimony to prove the irregularity and to show service.

The *third* concerns the admission of oral testimony to prove the contents of the dying declaration.

I.

The complaint in the first bill is, that the jury was not drawn at least fifty days previous to the term of the court.

The bill does not allege that the objection charged "that some fraud had been practiced, or some great wrong committed in the drawing and summoning of the jury, that would work an irreparable injury."

This charge not having been made, and being essentially required by Sec. 10 of Act 44 of 1877, p. 58, the complaint cannot be considered. 33 An. 141; 34 An. 118.

II.

The document served on the prisoner, as a copy of the indictment,

accompanies the transcript. It is apparently a fac-simile of the original, of its face and indorsement, the printing in the former being repeated in both, and the writing transcribed with accuracy. It is certified by a deputy clerk, under the seal of the court, *as a true copy.* This certificate covers both the face and the indorsement, the original blanks in which are filled by the same hand.

The list of jurors served is also attached to the transcript. It is a clipping from a newspaper, on which the seal of the court is impressed and at the foot of which appear the words, *a true copy,* followed by the printed name of the same deputy clerk.

The provisions of the Statute are: "Every person who shall be indicted for any capital crime, or any crime punishable with imprisonment at hard labor for seven years or upwards, shall have a copy of the indictment, and the list of the jury which are to pass on his trial, delivered to him at least two days before his trial." R. S. 992.

The law does not expressly say, that the list of the jury to be served shall be certified by the clerk, under his official signature, as a true copy.

Substantial compliance with the requirement of the law cannot be denied, where the list was authenticated by the impress of the seal of the court, and served by the executive officer of the court; where no averment or complaint is made that such list is incomplete, defective, or incorrect in any other respect, and where a comparison of it with the original list shows that it is an exact copy, and where it does not appear that any injury was sustained. The accused was entitled to a list of the jurors, and such list was furnished him. 28 An. 631.

It is needless to pass upon the other part of the bill of exception, for the reasons, that we ignore the testimony and evidence received and objected to *as irrelevant* by the accused; that the service of the indictment and list of jurors are admitted by the objection itself, and that the regularity of the copies was the only matter really contested.

We feel constrained, however, to censure the looseness with which both the copy of the indictment and the list of the jurors were issued by the clerk, through his deputy, for whose acts he is answerable. It seems to us, that documents of that importance should have been put in such unassailable form as would have successfully resisted all possible technical attacks as to authenticity. It is to be hoped that irregularities of such gravity as have been charged in the present instance, will in future be guarded against and not again occur.

III.

The last bill is to the admission of oral testimony to establish the contents of the paper containing the dying declaration of the deceased.

The loss of that document having first been established, and not being disputed, there was no other course to be pursued than to prove its contents by secondary evidence. Were oral testimony inadmissible in such a case, the suppression, loss, or destruction of such proof could easily often secure a verdict of acquittal, in a clear case of felonious homicide. The rule in such cases is too well known and elementary to demand special reference to authorities. Waterman Cr. D. 297; Roscoe Cr. Ev. 8.

Convicted murderers cannot avert, on flimsy technicalities, the high pains and penalties inflicted by conservative laws, which they have wilfully provoked and brought upon themselves.

Judgment affirmed.

No. 8932.

THE STATE OF LOUISIANA VS. JERRY ALEXANDER.

Mere temporary absence from the State, during the year prior to the service of a juror, if without the intention of changing citizenship or abandoning residence, will not destroy the qualifications of the juror.

APPEAL from the Second District Court, Parish of Bienville. *Drew*, J.

J. C. Egan, Attorney General, for the State, Appellee.

D. H. Patterson for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The sole error assigned is the overruling of a motion to quash the indictment, on the ground that one of the grand jury finding the same did not possess the qualifications required by law, because not a citizen of the State and not a *bona fide* resident of the parish for one year next preceding his service as grand juror.

It appears that the grand juror objected to had, for more than a year, sojourned in the State of Texas, upon business of a temporary nature, but, as he declares, with no intention of changing his citizenship or abandoning his residence in Bienville Parish. Upon concluding the business, he returned to his home, where he had been for about eight months prior to his summons as grand juror.

We agree with the District Judge that such temporary absence, under the circumstances and with the intentions disclosed, had no effect upon his citizenship, domicile, or upon his residence, in the sense in which that term is used in the Act No. 54 of 1880, prescribing qualifications of jurors.

No. 8935.

THE STATE EX REL. ALFRED MONTAGUE VS. LOUIS COQUILLON, JUSTICE OF THE PEACE IN THE PARISH OF ST. TAMMANY.

Under its supervisory jurisdiction, the Supreme Court will entertain a *writ of certiorari* against a justice of the peace, for the purpose of ascertaining the validity of his proceedings in an unappealable case. If, on examination of the proceedings, it appears that the magistrate has rendered judgment against the relator without giving him a hearing according to law, the judgment thus rendered will be annulled and avoided.

Under the provisions of Article 1084 C. P., either party is entitled to delay for the purpose of preparing his case, in a cause pending before a justice of the peace, on the first fixing of a cause.

Under Article 1085, if the parties fail to appear at the appointed time, and if they reside in the country, the justice of the peace must wait two hours before he can render a valid judgment in the premises.

APPLICATION for Writ of Certiorari.

P. G. Riddell and *J. A. Reid* for the Relator.

Defendant *in propria persona.*

The opinion of the Court was delivered by

POCHÉ, J. This is an application for a writ of *certiorari* against the defendant, Justice of the Peace, who is alleged to have rendered judgment in an unappealable case against the relator, without allowing him a hearing as the law requires.

The relief sought by relator is predicated on our supervisory jurisdiction; and in answer to a preliminary order the respondent has sent a certified copy of the proceedings in the premises.

From that record it appears that a suit was filed against the relator in respondent's court, on the 21st of May, 1883, and that citation was served on him on the same day.

It further appears that the defendant in the suit was notified, on the 25th of May, that the trial of the case was fixed for the 4th of June following, and that witnesses were summoned on the 29th of May.

The record shows that the defendant appeared in court on the appointed day, and asked for time to prepare an answer, and that his application was overruled, whereupon he retired and sought the advice of counsel, by whom an answer was prepared and presented to the court in less than an hour after the time appointed for the trial. At this juncture relator was informed by the magistrate that his answer came too late; that the case had been tried, and that judgment had been rendered against him. This information was followed by a formal notice of judgment served on the defendant on the same day, and

the whole proceeding culminated in the seizure of relator's property, notice of which was served on him on the 11th of June following.

Under the provisions of Article 1082 of our Code of Practice, the defendant had ten days to answer to the action, and that delay expired on the first of June. Hence, the notice of trial served on him on the 25th of May, and the subpœnas issued to witnesses on the 29th of the same month, before issue joined, and previous to the expiration of the legal delay granted to the defendant, could have no legal effect against him, and could not debar him of his legal right to answer to the action.

It, therefore, follows, that he was legally entitled, when he appeared before the court on the 4th of June, to a reasonable delay necessary to the preparation of his defence.

This right is specifically conferred by Article 1084 of the Code of Practice, which reads as follows:

"If both parties are ready to try the cause, the Judge may proceed to the hearing, otherwise the justice shall fix such a day and hour as he thinks proper, allowing sufficient time to the parties to summon their witnesses, if it be necessary."

It is plain to our minds that, under the rulings of the respondent, the relator has been unjustly denied the legal right contemplated by the Article just quoted.

Even if it could be held that the case had been legally fixed for the 4th of June, and that, in refusing defendant's application for delay in order to prepare his defence, the magistrate had exercised a sound and legal discretion, it would yet appear that his course in rendering judgment within an hour of the appointed time cannot be sustained in law.

Article 1085 of the Code of Practice provides, that if the parties reside in the country, as is the case herein, and if they should fail to appear at the appointed time, the justice shall wait two hours, after which he shall proceed to dispose of the cause by a final judgment.

It cannot be contended for a moment that the appearance of the defendant for the exclusive purpose of applying for delay within which to prepare a defence, is such an appearance as that Article provides for. The appearance contemplated is where the two parties are before the court, either in person or by counsel, (Art. 1087) for the purpose of a trial of the cause.

Hence, in this case, after the defendant had refused to go to trial, and had withdrawn from the court, it was the bounden duty of the magistrate to have waited two hours before proceeding to the trial of the cause. Had he done so, the answer presented by the relator, within an hour later, would have been in time, and a legal trial might then

have taken place. But by his hasty action, the magistrate stripped the defendant of his legal means of defence.

In either view of the case it is apparent that the course of the justice of the peace is unwarranted by law, and that it has practically operated a denial of justice.

Hence, we conclude that the judgment rendered by him, under the circumstances hereinabove stated, is absolutely null and void.

It is, therefore, ordered and decreed that the judgment rendered by the respondent magistrate against the relator, on the 4th of June, 1883, be annulled and avoided, and that respondent be ordered to try the case anew, in conformity with the provisions of the law, and that the respondent pay the costs of these proceedings.

No. 8931.

THE STATE OF LOUISIANA VS. LINDA TURNER AND MAJOR BRIGHT.

Where a part of the charge of the Judge to the jury is objected to, but it appears that the same has no bearing on the question of the guilt or innocence of the accused, and can in no manner prejudice him, whether correct or not, it will not be considered by this Court as affording any ground of relief from the verdict and sentence.

APPEAL from the Twenty-third District Court, Parish of Iberville. *Pope*, J.

J. C. Egan, Attorney General, for the State, Appellee.

Defendant unrepresented in this Court.

The opinion of the Court was delivered by

TODD, J. The defendants were convicted of larceny, and appeal from a sentence of twelve months' imprisonment at hard labor.

They rely solely upon an alleged error in the following portion of the charge of the Judge to the jury, to-wit:

"That it is not necessary that a warrant should have been issued, in order that an arrest could be made. That any sheriff, constable, peace officer or even a private citizen can make an arrest when he sees the person arrested perpetrating a crime, or about to escape, with the understanding that he arrests a criminal, and not an innocent person."

The issue tried was whether the defendants had stolen the property charged in the indictment. We are at a loss to see what possible influence the charge in question could have had on the minds of the jury, touching the issue on trial, that is, the guilt or innocence of the accused. Besides, the Judge explains satisfactorily in the bill of exceptions why the above clause objected to was embodied in his charge.

The appeal is wholly without merit.

Judgment affirmed.

No. 8944.

The State ex rel. Allen & Syme vs. The Judge of the Twenty-Second Judicial District et al.

Where it appears from anterior proceedings, that the District Judge has sustained his jurisdiction, it would be doing a vain thing to require the filing of an exception and its overruling, before considering an application for a prohibition. The rule in 29 An. 809 is not thereby infringed.

The writ does not lie to prevent a District Judge from trying exceptions filed after the granting of a new trial.

A judgment prematurely signed does not become final and produces no effect, where a motion for a new trial is seasonably made and subsequently granted.

Such motion, in the country parishes, where first continued to another term by consent of parties, and next, from term to term, by the court, and which the mover has uniformly endeavored to have tried, does not lapse at the close of either of the terms. It can be entertained and allowed by the Judge, where good cause is shown.

The granting of such a motion for a new trial practically obliterates the premature signature of a judgment.

12 An. 562; Estopinal vs. Zunts, not reported, O. B. 45, folio 24, and State ex rel. Wentz vs. Judge 5th Dist., 35 An., affirmed.

APPLICATION for a Writ of Prohibition.

J. K. Gaudet & Son and *R. G. Dugué* for the Relators.

Sims & Poché, contra.

The opinion of the Court was delivered by

Bermudez, C. J. This is an application for a prohibition to prevent the District Judge from trying a cause already decided by him, by judgment duly rendered and signed, and which, it is alleged, has become final and irrevocable, as concerns him. The District Judge returns that the judgment rendered never became final; that it was signed on the day on which it was rendered, but that, within three judicial days from such rendition, the cast defendant moved for a new trial; that this motion for a new trial was continued by consent to the next term; that it was not then tried, but was continued by the court, from term to term, until, coming up according to previous assignment, it was argued, submitted and granted, and a new trial ordered.

The facts disclosed by the record are simply the following:

On the 5th of November, 1880, a judgment was rendered in favor of the plaintiffs in the case, the relators herein, and was signed on the spot.

On the 8th of November, 1880, within three judicial days after the rendition of the judgment, the defendant filed a motion for a new trial, which, on the last day of the term, was continued by *consent of counsel*

till the next term, all rights being reserved, *to prevent the judgment from becoming final.*

At the subsequent term and the following ones, although fixed for trial, the motion was not tried. It was not until October 11th, 1882, that it was called for trial, counsel for plaintiffs in the cause, who are defendants in the rule, objecting on grounds stated in writing. The motion was then continued to the next day, when it was argued by counsel for the mover and taken under advisement by the court.

The court, on May 30th, 1883, rendered a decree maintaining the motion and granting the new trial asked.

On the 2d of October, 1883, the defendant in the case filed an exception of no cause of action, which, on his motion, was fixed for trial October 4th, two days later.

On the day previous to that fixed for the trial of the exception, *i. e.*, the 3d of October, the original plaintiffs applied to this Court for a prohibition to prevent such trial, on the ground that the case, having been finally determined by a judgment regularly rendered and signed, had passed beyond the control of the District Court, which had no further jurisdiction over it.

It may be that, under the rule, (which declares that no writ of prohibition will issue, forbidding a lower court from proceeding in a case before it, of which it is claimed it has no jurisdiction, until an exception to its jurisdiction has been tried and overruled, 29 An. 806) the present application could be refused as *premature;* but, as it appears that the District Judge in this case is the same before whom the plaintiffs had appeared to object and to whom the ground of opposition, which is the same as that now urged, was submitted; that he has disregarded those objections and has fixed the exceptions for trial and has joined issue in this Court touching the finality of the judgment and the question of jurisdiction, we think that we are not derogating from the rule, in assuming that the District Judge has, after objection, maintained his jurisdiction. It appears to us that it would be, therefore, doing a vain thing to require the filing and overruling of an exception to his jurisdiction, before considering this application for a prohibition, which we will now proceed to do.

The relators contend that, in the *country parishes*, three things are necessary to enable a party to obtain a new trial: 1st, there must be good cause for it; 2d, the motion must be made in season; 3d, it must be determined before the adjournment of the court for the term at which the judgment was rendered.

There can be no doubt that, in *all* the parishes of the State, a new

trial cannot be granted unless seasonably asked and good cause shown; but is it true that, in country parishes, where the party cast has made his motion in time and has alleged good cause, he is not entitled to a new trial merely because the motion was not determined at the very term at which the judgment was rendered?

The motion for a new trial in the case below was made in time, but it was not determined at the term at which made. It was continued by consent of parties to the next term. At that term, and at all subsequent terms, the defendant cast, mover for a new trial, is shown to have been almost restless, insisting again and again on a trial of his motion; but it appears that each time the trial of the motion was continued, *by the court*, from day to day and from term to term, until finally it was acted upon, notwithstanding the objections of the plaintiffs in the case and defendants in the rule; the court finally allowing it and granting a new trial.

The contention of the relators is that, as the motion was not determined at the term at which the judgment was rendered, the judgment, although prematurely signed, has become final and the motion for a new trial could not be tried thereafter. They invoke the Act of 1839 and Articles 546 and 558 of the Code of Practice and infer that, where the motion for a new trial is not determined at the same term at which the judgment was rendered, it lapses and the judgment becomes at once final.

The relators could not successfully invoke this rule, even if the law stood their construction, because they themselves *consented* to a continuance of a motion for a new trial to the *next* term and cannot be permitted to avail themselves of their consent to the injury of the mover in the rule for a new trial.

It is remarkable that the Articles relied on do not prescribe any penalty, and that, owing to this omission, cannot be considered as being penal or mandatory laws, enacted for the preservation of public order or good morals.

The court cannot supplement the law and enact penalties where the legislature has not deemed proper to append any.

The provisions invoked are merely directory to the Judge and designed to regulate the administration of his judicial powers or faculties and the discipline of his court.

It is manifest that the judgment in the case under consideration having been signed on the same day that it was rendered, was prematurely signed and, under the consent of the parties, can, under no possible aspect, be considered as having since been regularly signed and

as susceptible of defeating a motion for a new trial. 5 N. S. 244; 4 An. 561; 6 An. 251; 20 An. 168; 23 An. 110.

The cast defendant has done everything which the law required of him. He has filed a motion in due time, has set forth plausible grounds, which were subsequently considered sufficient to justify a new trial, and is in no way chargeable with laches.

He finds himself in the very same predicament that an appellant is in, who files within legal delay a petition and bond of appeal.

He is entitled to the action of the court on his motion for a new trial as much as the appellant is to an order of appeal on his demand for one.

Neither the one nor the other can be made to suffer where, by no fault of theirs, the new trial was not allowed at the same term, or the appeal granted before the legal delay for appealing had elapsed.

In the Gilmore case, 12 An. 562, this Court said in an analogous issue:

"It was irregular to sign the judgment until the motion for a new trial was determined. * * The neglect of a Judge to perform his duties ought not to prejudice the parties who had a right to be heard on the motion."

In the case of Estopinal vs. Zunts, Opinion Book 45, folio 23, in which a motion to dismiss was made, on the ground that the order for a suspensive appeal had been granted *after* the expiration of the legal delay, the Court denied the motion, saying:

"The petition and bond were filed in time. The order of appeal appears not to have been signed until the 24th November (after the expiration of the legal delay) but this cannot prejudice the appellant's rights. He filed his petition and his bond within the time required by law, and he cannot be made to suffer because the Judge did not sign the order of appeal at the time the petition and bond were presented."

In the more recent case of State ex rel. Wentz vs. Judge Fifth Judicial District, *ante*, p. 873, this Court held, that a mandamus does not lie to compel a Judge to render judgment or to sign one which was tendered him by counsel, in accordance with the verdict of a jury, where there is a motion for a new trial, *made at a previous term*, pending and undecided and when the Judge *proprio motu*, at a subsequent term, has quashed the verdict and reinstated the case to be tried *de novo*.

The Court there said: "The Judge had no authority to sign the judgment without first disposing of the motion. * * He would, in doing so, have committed a wrong."

The granting of the new trial practically obliterates the signature affixed to the judgment when rendered.

Those precedents can well apply to the present case, which clearly falls within their purview.

We have taken unusual pains in the examination of the issue here raised, because of its importance and because its decision will settle a question of practice somewhat seriously mooted and which should be set at rest.

It is, therefore, ordered and decreed that the restraining order herein made be rescinded, and that the application for a prohibition be refused at the cost of relators.

No. 8996.

THE STATE EX REL. C. CREMONINI VS. THE MAYOR OF BATON ROUGE.

A suspensive appeal having been dismissed for insufficiency of the transcript, the appellant is entitled to a devolutive appeal, if applied for within a year from the rendition of the judgment.

APPLICATION for Writ of Mandamus.

Knox & Laycock for the Relator.

C. C. Bird, City Attorney, for the Respondent.

The opinion of the Court was delivered by

MANNING, J. The relator's suspensive appeal from a judgment of the respondent was dismissed for insufficiency of the transcript. Baton Rouge vs. Cremonini, 35 An. 367. He applied within the year for a devolutive appeal, which the Mayor refused, and having obtained an alternative writ of mandamus from this Court, now prays that the Mayor be peremptorily ordered to grant the appeal.

The answer shows for cause the former appeal and its dismissal, and charges that the relator is attempting by this proceeding to add documents and evidence to the former transcript without having resorted to a certiorari to supply its deficiencies; and that he has prayed for an additional transcript to contain certified copies of the ordinances and resolutions of the town council relating to the subject matter.

The answer is insufficient. These are matters with which the Mayor has no concern. If the transcript which the relator shall file here be imperfect, he alone will suffer. The absence of the ordinances, etc., which he now seeks to supply, caused the dismissal of his former appeal. The appeal he now prays is devolutive, and was asked in time. He is entitled to it.

Let a peremptory writ of mandamus issue as prayed.

No. 8910.

THE STATE OF LOUISIANA VS. WILLIAM TOLLIVER.

If the appellant in a criminal case presents no bill of exception or assignment of errors, and if the record shows that the proceedings and the trial were regular and legal, the judgment of the lower court must be affirmed.

APPEAL from the Twentieth District Court, Parish of Lafourche. *Knobloch*, J.

J. C. Egan, Attorney General, for the State, Appellee.

Defendant unrepresented in this Court.

The opinion of the Court was delivered by POCHÉ, J.

No. 8818.

WILLIAM GARIG ET AL. VS. BUSH & LEVERT ET AL.

The provisions of Art. 210 of the Constitution apply only to taxes thereafter to be levied.

The validity of sales made under Act 107 of 1880, depends upon the validity of the sale or forfeiture under which the property is alleged to have passed to the State.

In this case, the forfeiture to the State being held to be invalid for defective proceedings, the sale under Act 107 is annulled.

APPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Sherburne*, J.

C. D. Favrot and *L. D. Beale* for Plaintiff and Appellee.

Burgess & Burgess for Defendants and Appellants.

The opinion of the Court was delivered by BERMUDEZ, C. J.

On the Rehearing the opinion of the Court was delivered by FENNER, J.

No. 8950.

THE STATE EX REL. MRS. M. LEWIS VS. THE JUDGE OF THE SECOND CITY COURT OF NEW ORLEANS.

A City Judge has jurisdiction in an ejectment proceeding, by landlord against tenant, and can determine whether the defendant holds or not under a lease at a price exceeding one hundred dollars. 34 An. 1142, reaffirmed.

When it is not shown that he has abused his powers by arbitrarily usurping jurisdiction over the subject matter, a prohibition will not issue.

APPLICATION for Writ of Prohibition.

S. Belden & R. B. Elliott for the Relatrix.

A. J. & O. Villeré for the Respondent.

The opinion of the Court was delivered by BERMUDEZ, C. J.

No. 8942.

R. AND J. HOLDEN VS. THE JUDGE OF THE SECOND CITY COURT OF NEW ORLEANS.

Under an application for prohibition, the Court will not inquire into the jurisdiction of a court to issue a writ of sequestration, when, prior to the application, the case has passed to final judgment, and the property which had been sequestered had been seized under a writ of *fi. fa.*

When property claimed to be exempt from seizure has been seized under a *fi. fa.*, the question of its exempt character is one of mixed law and fact, proper for the court to pass on, and mere error in such determination, unless gross and wilful, will not furnish ground for prohibition.

APPLICATION for Writs of Certiorari and Prohibition.

E. T. Florance, for the Relator.

Defendant *in propria persona.*

The opinion of the Court was delivered by FENNER, J.

No. 8965.

The New Orleans Waterworks Company vs. The Louisiana Sugar Refinery Company and The City of New Orleans.

The City of New Orleans has the right to grant the privilege of laying pipes and conduits, across and through the river bank and the public streets, to parties asking the same, to draw water from the river for their own use and purposes.

The right thus conceded does not come in conflict with those of the Waterworks Company, and can, therefore, be legally exercised under the terms of the privilege, and during the pleasure of the municipal authorities.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

Albert Voorhies and *T. J. Semmes & Payne* for Plaintiff and Appellant:

The legislative Charter, as well as the transfer from the City of New Orleans to plaintiff, confers upon it the exclusive right to supply the City and her inhabitants with water from the river through pipes and conduits.

None but contiguous or riparian proprietors can claim the benefit of Sec. 18 of Act No. 33 of 1877.

The City of New Orleans is, by her transfer to the New Orleans Waterworks Company, bound to warrant this Company in the use and enjoyment of the above exclusive right. C. C. 2475 (2450), 2476 (2451), 2500 (2476).

A. Goldthwaite for Defendant and Appellee.

The opinion of the Court was delivered by

Bermudez, C. J. The object of this suit is to annul the permission which the City of New Orleans has granted the defendant Company, to lay water pipes from its factory to the Mississippi river, under municipal direction and control, the permission being revocable at the pleasure of the council. The petition is accompanied by a prayer for an injunction to prevent the Company from using said permission and to command the City to revoke the same. It concludes with a demand for ten thousand dollars damages *in solido* from the Company and the City.

The defense is, that the Company, in common with all other inhabitants, has an inalienable right to draw water from the river for their own use and supply; that the defendant has obtained the valid authority of the City to lay pipes and conduits from the river to within its premises, to accomplish that purpose; that the plaintiff corporation has and enjoys the privilege of drawing water from the same river, by means of pipes and conduits, for the sole purpose of supplying with water the City and its inhabitants; that the defendant Company has not supplied, and does not intend to supply, the City or any inhabitant of the City of New Orleans, with water through its pipes, which are exclusively for its own use and for its manufacturing purposes.

There are other defences, which it is needless to set forth.

From an adverse judgment, the plaintiff corporation appeals.

The facts are few and indisputable.

In 1833, the legislature chartered the Commercial Bank of New Orleans, conferring upon it the right to have *forever* the *exclusive privilege* of supplying the City and its inhabitants with water from the Mississippi river, by means of pipes and conduits, and imposing upon the exercise of that right, certain onerous conditions which it is unnecessary to mention.

In 1868, under the terms of the charter, the franchise and the property of the bank passed for a valuable consideration to the City of New Orleans, who carried on the works until 1877, when the plaintiff corporation being chartered, the City transferred to it all her rights to the franchise and property acquired, as stated.

Section 5 of Act 13 of 1877, p. 51, chartering the plaintiff corporation, provides that it shall have for *fifty* years the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and, to that end, to put up such constructions and do such work as may be necessary "through, or over any of the lands or streets of the City of New Orleans."

Section 18 of the Charter formally recognizes the right of the city council of granting to persons contiguous to the river, the privilege of laying pipes to the river for their exclusive use.

The Charter confers rights and imposes obligations which it is not imperative to specify.

In March, 1883, the city council authorized the defendant Company to erect its factory and to lay water and sewerage pipes therefrom to the river, according to lines and grades to be furnished by the surveyor, under certain restrictions, one of which being that the permission shall remain *revocable* at the pleasure of the council.

The question which arises, under such state of facts is, simply: Whether the City of New Orleans had the right to grant the authority. If the City had such a right, the defendant Company has a right to exercise it.

In order to determine that question, it is essential, first, to ascertain what is the nature and extent of the privilege originally conferred by the State upon the Commercial Bank and which passed to the City of New Orleans, by whom it was afterwards transferred to the defendant Company, organized, as it was, by a charter which is explicit as to its prerogatives and responsibilities.

The preamble of the Act of 1833, which creates and charters the

Commercial Bank, declares that its object is to be the conveying of water from the river into the City of New Orleans and its faubourgs, and into the houses of its inhabitants; and Section 4 confers to it *forever* the *exclusive* privilege of supplying the City, its inhabitants and faubourgs, with water from the Mississippi river, by means of pipes or conduits or hydrants. Those expressions are almost identical with those found in the Act of 1877, with the exception that the duration of the privilege, instead of being *perpetual*, is limited to the term of fifty years.

The right conferred by the legislature in 1833, and confirmed in 1877, was not to draw water from the river, nor was it to lay pipes and conduits on the lands and streets of the City of New Orleans. It was the *exclusive* privilege of supplying the City and its inhabitants with water drawn from the river by those means, the object in view being, on account of benefits derived by the City, the *exclusion* of all others, corporations and individuals, from making a similar supply, in other words, from selling and vending water.

The Commercial Bank, in common with all the inhabitants of the City, possessed, independent of any legislative grant or concession, the right to draw water from the river for its own purposes, and to supply the City and its inhabitants with it; but it did not, any more than any of the inhabitants of the City, have the right of laying the pipes and conduits necessary to convey the water through or over any of the lands or streets of the City, and to do so it required special authority, either directly from the State, or from its functionary, the City herself. The right which it did not possess and which no other inhabitant possessed, was the exclusive privilege of supplying the City and its inhabitants forever, or a limited time, by means of pipes and conduits laid through the public soil.

The moment that privilege was conferred by the State on the corporation, to supply the City and its inhabitants with water from the river, through pipes and conduits which it was authorized to lay through and over any of the lands or streets of the City, all preëxisting, as well as all subsequently arising rights, which could have otherwise been exercised, ceased to be available, and competition for such supply became an absolute legal impossibility.

The rights to that exclusive privilege, under the present Constitution, is contested by the defendant; but it is entirely out of place to consider whether it exists or not, as, under the pleadings and the facts, the question of competition is not at all at issue.

The City of New Orleans does not claim to have conferred on the

defendant Company, and that Company does not claim to have received from the City, the right or privilege of supplying the City and its inhabitants with water by means of pipes, conduits and hydrants.

The City and the defendant Company claim only, that the former had a right to grant, and the latter has that to enjoy, the permission of laying pipes and conduits from the river to its factory, for the sole purpose of supplying itself with river water for its own purposes, and for no other.

It cannot be doubted for an instant that, as the City has, under general laws and by her charter, which emanates directly from the sovereign, the exclusive control and regulation of her public lands, quays, streets and avenues, she had the right of permitting the defendant Company to lay pipes and conduits across the quay and through the streets, from the river to within its factory limits, for the purpose of supplying itself with the water needed for its objects. R. C. C. 450, 453, 455, 457; 14 An. 854; 32 An. 915.

It is true, that Section 18 of the Charter of 1877 expressly protects riparian or contiguous proprietors against a possible effect of the *exclusive* privilege granted; but the provision there found is not to be construed as one conferring a privilege or right which otherwise would have had no existence. It is indisputable, that such riparian or contiguous owners would, independent of the declarations in Section 18, have enjoyed that right, which could, under no contingency, have thus been abridged.

They had, clearly, not only the privilege, in common with all others, to draw the running water from the river for domestic purposes, *ad lavandum et potendum*, but also, on principle, that, without the need of a previous permission, of laying pipes from the river to their premises, to draw the water necessary for their use. The State and her functionaries—political corporations—however, have the right, in the exercise of the police power, of regulating the enjoyment of that right, denying or permitting it, according as public security and good may or not demand.

If Section 18 was designed for any practical object, it could only have been to secure the contiguous owners, beyond the possibility of a doubt, their indisputable rights, subjecting them, however, to the control of the municipal authorities, as the improvident or careless exercise of such rights, across the river bank and through the public street of a populous metropolis, might be attended with great calamitous consequences, inflicting incalculable wrong and injury.

The right of the plaintiff to the City's warranty, as transferror of the franchise and property of the former Commercial Bank, is no founda-

tion for this action. If the plaintiff has the exclusive privilege in question, nothing shows that the City has done or does, or proposes doing, anything designed to impair the right which the plaintiff has to supply, with river water, the City and its inhabitants.

Lord Chief Justice Wilmot, (op. and judg., p. 378) has well observed:

"It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the interest of commutative justice, and when they find an action is founded on a claim injurious to the public and which has a bad tendency, to give it no countenance or assistance in *foro civile*."

Well aware of, and in keeping with that wise rule of public security, we think it our duty to reject, as the lower court did, the demand of plaintiff.

Judgment affirmed with costs.

No. 8666.

WILLIAMS, PINCKARD & CO. VS. JULIUS ARONI.

A party who contracts with a broker in cotton for future delivery, with special reference to the rules of the Cotton Exchange in New Orleans, agrees thereby that his contract will be governed by such rules, and he will, therefore, be held to comply with the same.

Hence, if his contract is closed out under such rules, by reason of his broker's failure, and before its maturity, he must abide the consequences, and must make good the losses of his broker under the contract.

If the broker settles his liabilities with his creditors at the rate of fifty cents on the dollar, he cannot recover a greater proportion on the account of his principal. He is entitled to recover the amount actually disbursed by him and no more.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

H. L. Dufour and *J. O. Nixon, Jr.* for Plaintiffs and Appellees:

1. Where a contract is made expressly subject to certain rules of trade, and those rules are known to the person making the contract, that person is responsible for any loss that may ensue in either the carrying out or termination of such contract under such rules.
2. A person who, with knowledge of all the facts, and under no error of law, acquiesces in a settlement, cannot subsequently, when the market has changed, change his position to the prejudice of those with whom he is dealing.
3. Parol evidence is admissible to show a new agreement, or a modification of a previous written agreement. Leeds vs. Louisiana, 17 An. 32; Bouligny vs. Urquhart, 4 La. 30; Gardeur vs. Battaille, 5 An. 597.
4. Where a broker has made a partial settlement and is still liable for the balance, he can recover the whole amount of loss made by the customer. Lacy vs. Hill, L. R. 18 Eq. 182.

E. M. Hudson and *W. F. & D. C. Mellen* for Defendant and Appellant:

1. No broker can have a valid claim for his commissions or other compensation, if he has not discharged all the duties of the employment which he has undertaken with proper care,

skill, and fidelity. Parsons on Contracts, 6th ed., No. 100; C. C. 3022, 3024; Sibbold vs. Bethlehem Iron Co., 11 N. Y. Weekly Digest, 445.

2. The margins, deposited by the principal with his broker to secure the latter against loss, are a special trust fund which the principal has the right to have applied in payment and satisfaction of the contracts made in his behalf by the broker. 10 Bosworth, N. Y. S. C. 356.

3. The sole ground on which a broker can recover from his principal, for moneys expended or losses incurred, is that the principal is bound to indemnify his broker for monies paid out or liabilities incurred at the request, express or implied, of the principal. It is immaterial whether the broker voluntarily converts his principal's property to his own use, by wrongfully closing out his contracts, or whether, from no fault of the principal, but solely from his own insolvency and inability to carry out his undertaking, the principal's contracts are closed out under the rules of the brokers' exchange. Duncan vs. Hill, L. R. 8 Ex., pp. 247, 248.

4. Where the agent, as in this case, is subjected to loss, not by reason of his having entered into the contracts in behalf of his principal, but by reason of a default of his own—that is to say, by reason of his insolvency, brought on by want of means to meet his other primary obligations—it cannot be said that he has suffered loss by reason of his contracts in behalf of his principal; and consequently there is no promise which can be implied on the part of his principal to indemnify him; and no express provision to this effect is is shown; Young vs. Cole, 3 Bing. N. C. 724; Child vs. Morley, 8 T. R. 610.

5. The broker's insolvency, by defeating the undertaking entered into on behalf of his principal, operates an entire failure of consideration on his part, thereby entitling the principal to recover back all funds furnished as margins to protect his contracts, and defeating all claim to compensation on behalf of the broker. Ibid.

6. Rules among brokers, so far as they relate to the time and mode of payment, the time and mode of delivery, the various allowances to be made, and all such matters as arise upon the contract made in the market, are valid, and their principals would be bound by the usage; but so far as they seek to change the nature or intrinsic character of the contracts, or are against law, they are void, and cannot be permitted to affect the rights of the principals. Robinson vs. Mollett, L. R., vii. E. & I. App. pp. 818, 819.

7. A visiting member of the New Orleans Cotton Exchange is subject to the rules of order of the Exchange, but is not, by reason of his being a visiting member, bound by rule 28 of the Exchange. Rule 28 is intended to apply to active members of the Exchange, in reference to their contracts with each other; and can have no effect on contracts which such members, as brokers or agents, may have with their principals. It cannot be permitted to override the law governing the relations between principals and agents. Ibid.

8. An agent cannot, in a suit against his principal for moneys alleged to have been paid out by him, for account of his principal, under any circumstances, recover more than the amount actually paid out with interest.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs, who were brokers in cotton for future delivery, were employed as such by defendant to purchase cotton for him for delivery in April, 1882.

Conforming to their principal's instructions, they had made for him, and held a contract of purchase of eight hundred bales for the April delivery, when, on the 13th of February, they failed in business, and suspended.

Under the rules of the Cotton Exchange, which control and regulate

such transactions, all their contracts in the Exchange were closed out, and their notice of suspension having been posted up in the Exchange after 2 o'clock P. M., their contracts were required to be settled on the average quotation of prices of the next day: the 14th of February, 1882.

On that settlement it was ascertained that the losses sustained by plaintiffs, on account of their cotton transactions as defendant's brokers, amounted to $3,868.93.

In answer to sundry calls made on him by his agents, to cover margins of probable losses occasioned by the purchase as stated above, the defendant had deposited with his said brokers the aggregate amount of $2,435.62.

Allowing him credit for such deposits, plaintiffs have brought this suit for the recovery of the sum disbursed by them, as above stated, which, including other matters to the credit and debit of the account, such as a commission of one hundred dollars, etc., they foot up at the sum of $1,432.94, for which they obtained judgment in the lower court. Defendant filed a general denial, followed by the special defence that plaintiffs had closed out his contract without his authority or instructions, and through no fault of his, by which course they had forfeited all rights against him under the contract, and he claimed in reconvention the sum of $2,435.62, which he had deposited with them as above stated.

Further defending, he averred that plaintiffs had settled all their liabilities under the contracts closed out under the rules of the Exchange, at fifty per cent. of the amounts due, and that, in consequence thereof, the only sums which they had disbursed for his account amounted to $1,934.46, leaving them his debtors for the difference between said sum and the amount of his deposits for margins.

Both parties fully and unequivocally recognize the legality and binding effect of contracts for the purchase and sale of commodities for future delivery. Hence, the question of the legality or morality of such contracts is entirely eliminated from the consideration of this cause.

Defendant's first or main proposition is, that plaintiffs having closed out his contract without his authority or instructions, and contrary to the terms of the undertaking, they are not only debarred from the right of recovering any losses resulting therefrom, but that they have thereby incurred the liability of reimbursing to their principal all the losses caused by their wrongful act.

It is not denied that the plaintiffs' contracts were correctly and legally closed out under the rules of the Exchange, but defendant resists application of these rules to his contract with his brokers.

On this point the record shows that, under his own signature in his contract with plaintiffs, the defendant agreed to be controlled by the rules of the Exchange, and it also appears that he was a visiting member of the Exchange, and had been the attorney of several committees of that corporation. Hence, the conclusion that he was familiar with the rules of the Exchange, and that he had full and intelligent knowledge of rule 28 of the Association on the subject of *failures*. In point of fact, he acknowledges that he was aware of the rule.

This is the rule which provides for the closing out and settlement of all the contracts carried by any member who gives the required notice of his inability to meet his obligations with other members at maturity. That, as well as all the other rules of the Exchange, therefore, became a part of the contract of defendant with his brokers, just as though they had been incorporated in the contract.

In thus employing these agents defendant, therefore, incurred the risk of their failure and of the prescribed consequences thereof, touching his contract with them. True, he omitted or committed no act which contributed in the least to the disaster; but under the circumstances of his contract, he occupies no better position towards his agents than would otherwise be the case, and they are not more liable in responsibility towards him for the unforeseen calamity than they would be for the consequences of a falling market. The failure was not the fault of the defendant, and no more can it be attributed to the negligence or want of skill of the plaintiffs.

Their misfortune was to carry too many contracts of purchase in a falling market, owing to the erroneous judgment of other principals who, like the defendant, had calculated on a different state of things.

In this aspect of the case, the brokers were situated precisely like the agent in the case of Lacey vs. Hill, L. R. Eq. vol. 18, p. 182, who could not foresee the default of their principal, in the face of his positive promise to the contrary.

The two authorities mainly relied upon by defendant, in support of his theory, deal with principals who were shown to be ignorant of the custom of trade invoked against them, and it was therefore held, that they were not bound thereby.

In one of those cases, it was found that the custom or rule invoked was wholly unreasonable. We therefore conclude, that these decisions cannot control the instant case. Robinson vs. Mollett, L. R. 7 Eng. and Irish Appeals, 802; Duncan vs. Hill, L. R. 8 Ex. 242.

As the defendant contracted with plaintiffs with special reference to the rules of the Cotton Exchange, and bound himself to be governed thereby, the question of the reasonable character, the legality or the

binding effect of these rules *per se*, and of their availability on the enforcement of the contract finds no place for discussion in this case and must be eliminated therefrom.

We therefore conclude, that plaintiffs are legally entitled to compensation for the losses sustained by them in the transaction of the business.

This brings us to the consideration of the amount which they may lawfully claim.

By their own judicial admission they show that the actual amount disbursed by them on account of defendant's contract was only fifty per cent. of the amount which they claim, and hence the conclusion that they cannot recover more.

This fact of a settlement at fifty cents on the dollar is further shown by the written agreement of all their creditors to that effect, and by their subsequent receipt of the amount agreed upon.

The effort of plaintiffs to show that they had a verbal agreement with creditors to pay more as they made collections cannot be entertained for a moment, in the face of a settlement which the rules required to be *full*, as a condition precedent to their readmission as members of the Exchange. Good faith and fair dealing operate as a complete estoppel of that pretension.

No more can they succeed in their attempt to show that they had settled at par for six hundred bales of the defendant's contract, by offset with fellow brokers, to whom they had sold cotton, through the process known in the language of the trade as the *ringing out* of contracts.

The very account which they presented to defendant, and on which this suit is based, charges that the loss on the 800 bales was incurred on the 15th of February, 1882, and hence, defendant's liability to them cannot be affected by their previous operations with other brokers, while his contract was in full force and at the very time that a call of eighteen hundred dollars was made on him.

A different ruling would open the door to frequent and great abuse of the confidential relations existing between principal and agent, and would tend to legalize very dangerous practices, easily understood without further explanation.

But above all these considerations, it is clear in law that plaintiffs are absolutely estopped from attempting to prove a claim different from the cause of action set forth in their pleadings.

As the defendant is charged with a loss of $3,868.93, alleged to have been disbursed by his agents, he is legally entitled to ascertain the manner in which that sum was disbursed. Such an examination is of

the very essence of the controversy, and cannot be resisted or evaded by the agent who judicially demands reimbursement for losses alleged to have been sustained by him in the transaction of his principal's business. Plaintiffs' own evidence shows that, on account of the alleged losses sustained in these transactions, they have actually disbursed but fifty cents on the dollar.

They contend, in their brief, that the deposits made by the defendant had been absorbed by being put up as margins, before the 13th of February, the day of their suspension, and that the portion of defendant's liability, which they settled at the rate of 50 per cent., was only the difference between the amount of the deposits and that of the losses. But that argument is not borne out by the record, which is silent on the subject; and the account sued upon leads to a different conclusion.

To the suggestion that the defendant did not call for a detailed account of the disbursement of his funds, we answer that it was incumbent on the plaintiffs to present and prove such an account.

In the absence of such proof, we are bound to conclude with the defendant, that his funds were held by his agents at the time of their failure. The burden of proof was on plaintiffs, and their silence must be construed against them. On such a vital point it will not suffice to invoke the custom of the Exchange, it must be shown that plaintiffs had actually complied with the rule or custom.

In the absence of such proof, we must construe the account literally, and that view justifies the conclusion that the losses on defendant's purchase was settled by plaintiffs at the rate of fifty cents on the dollar. Having disbursed but $1,934.46 for account of their principal, they owe him the difference between that sum and the amount of his deposits.

We are also of opinion that they are entitled to no commission in the premises, for the reason that they did not perform the service which they had undertaken in their contract.

Their obligation was to carry the defendant's contract to April; they closed it with losses in February; and admitting that they yielded to overpowering circumstances, it is nevertheless true that they did not complete the mission which they had undertaken. Parsons on Contracts, 6th Ed., 100.

The judgment of the District Court is therefore reversed, and it is ordered and decreed that there be judgment in favor of the defendant against plaintiffs in the sum of five hundred and one 16–100 dollars ($501.16) and costs in both Courts.

Rehearing refused.

No. 8721.

WILLIAM T. LEVINE ET AL. VS. BERNARD MICHEL.

In an injunction suit to prevent the continuance of the acts complained of, plaintiffs alleging that those acts, if persisted in by defendant, will cause them more than $2,000 damages this Court has jurisdiction of the case.

Under the Statutes of the State relative to the appointment of Branch Pilots of the Port of New Orleans, and regulating their duties, a partnership or association of the said pilots, though State officers, for the purpose of furthering and protecting their common interests, is not illegal. Under the language of these Statutes such association is authorized, and excepts the pilots from any legal principle which would forbid such an association of State officers for the purposes declared.

Articles 1926, 1927, 1929 of the Code, authorizing specific performance of obligations to do or not to do in certain cases, apply to contracts of partnership as well as to other conventional obligations.

Where, by a valid contract of partnership, a partner bound himself: 1st, to devote his time, labor, skill, etc., to the partnership business; 2d, not to carry on the partnership business otherwise than as a partner, the latter negative obligation may be enforced by injunction, although the former cannot be specifically enforced.

APPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais*, J.

J. R. Beckwith for Plaintiffs and Appellees:

1. Under the ruling in 32 An. 1135, 1187; 34 An. 834, and in No. 8749 of the present docket, this Court is without jurisdiction to hear this case on appeal.
2. The agreement of association between the Branch Pilots of the Port of New Orleans, set out in the record, is lawful, and is not governed by the law relating to partnership (R. S. 2707-2709) being specially authorized and recognized by statute.
3. If the articles of association in the record are held to be partnership, the Court will enforce specific performance of the contract, both of the affirmative covenant to contribute to the partnership the authority, skill and labor of the defendant, and the negative covenant on his part not to enter into a like business on his account, or with others, to the injury of his associates. Marble Co. vs. Ripley, 10 Wall. 339; Chitty on Contracts, 11th ed. 341; 2 Term Reps. 482; 7 Mod. 116; 13 East. 538; 6 Simmons, 333; 9 Condensed Eng. Chancery Reps. 236; Parsons on Partnership, 298; 16 Ves. 382; 4 E. D. Smith, 135; 13 Eng. Law and Equity Reps. 252; 2 Edward's Chancery Reps. 529; Winta vs. Vogt, 3 An. 16.

E. H. McCaleb and *F. C. Zacharie* for Defendant and Appellant:

Under the *regime* of the civil law no one can be enjoined to carry on a partnership requiring the exercise of skill and industry. The only action to which the recalcitrant partner subjects himself for failing to comply with the partnership contract, is a suit for the damages to the partnership occasioned by his acts. Institutes of Justinian, Lib. III, Tit. XXVI, § IX; Bail c. Moulong et Brisson, Cour de Lyon, 18 Mai, 1823; R. C. C. 2862; 13 An. 519. L'inéxécution volontaire de ses engagements par un associé le rend passible de dommages-intérêts. Troplong, Contrat de Société, 988.

A partner who has agreed to furnish his skill and labor should be deemed to have contracted a hiring of his services. Pardessus, Cours de Droit Commercial, Tome IV, No. 989.

In an obligation to do or not to do, the creditor cannot coerce his debtor to a performance of his contract without violating his liberty. *Nemo potest praecise cogi ad factum.* Pothier,

Traité des Obligations, partie 1, chapitre II, § 11, No. 157; Duranton, Liv. III, Tit. III, No. 453; Laurent, Tome XVI, No. 459.

A dispute arising in a pilotage partnership cannot be settled by injunction. 26 An. 311. Nor can the Court, by injunction, direct or control a public officer in the performance of his duties. 34 An. 746; 24 An. 16.

A chancery injunction bill is unknown to and unauthorized by the Louisiana Code of Practice. In this State a writ of injunction is merely ancillary to a suit—a conservatory act accompanying a principal demand. It is synonymous with the common law writ of prohibition. 99 U. S. 380.

Compelling the defendant, by injunction, to specifically perform the obligations stipulated in the articles of co-partnership, violates the very letter of the law authorizing the Branch Pilots to "form themselves into one or more voluntary private associations." R. S. 1870, Sec. 2707. Such association ceases to be voluntary and becomes compulsory when kept together by a mandatory injunction.

The following clause in a contract of partnership, "said parties being bound to the provisions of this article in the penal sum of $5,000 each, and forfeiture of all right, title and interest in this partnership," is a conditional novation, an agreement that if the first obligation was not fulfilled, it should be extinguished and supplanted by the second. The creditor cannot, in such case, enforce the primary obligation. Digest Book XLIV, Tit. VII, Law 44, § 6; Pothier, Traité des Obligations, Partie II, Chap. V. No. 342; Marcadé, Tome 4, No. 651; Duranton, Tome 10, No. 485; Idem, Tome 11, No. 338.

A creditor cannot exact the enforcement of a primary obligation and at the same time reserve his right to claim the penalty. A judgment permitting such reservation should not be affirmed. R. C. C., Arts. 2124, 2125; 18 An. 276.

The opinion of the Court was delivered by

TODD, J. This is a suit substantially by the Pilots' Association, composed of the Branch Pilots of the Port of New Orleans, against the defendant, a member of the same association, to compel him to a specific performance of his engagements under the articles of agreement entered into by said members when the organization of the association took place; and to enjoin him from the commission of certain acts designated specifically and at large in the petition, and charged to be in violation of his said engagement and obligations to the company.

We are met at the threshold of our inquiry into the case, by a suggestion of the plaintiffs' and appellees' counsel that this Court is without jurisdiction of the appeal—*ratione materiæ*—and under this suggestion we have made a careful examination of the pleadings and the record, with a view to determine the question.

The main object of the suit, as stated, seems to be to preserve intact, and to protect from infringement on the part of any member, the articles of agreement which form the basis of the association.

There is no moneyed demand made against the defendant, except for the payment of the costs of suit. There is, however, an allegation in substance that, if the defendant is permitted to continue in the commission of the acts complained of, it would cause damage to the amount of $2,000. With respect to the acts already done, of which

complaint is made, the right is reserved in the petition to claim damages therefor in another suit, and this reservation is made in the judgment.

An injunction issued, as stated, to restrain the defendant from committing the acts specified as violative of his obligations to the association. This injunction was set aside on bond, and the plaintiffs appealed from this order. We note that, in the petition for the appeal, it is asserted that the damage the defendant will inflict, while the writ of injunction is suspended, exceeds two thousand dollars per month. The object of the suit is to prevent or avoid such damage. It is plain that the Court has jurisdiction.

ON THE MERITS.

The defendant excepted to the plaintiffs' action, on grounds substantially as follows:

That plaintiffs are absolutely without right to maintain this suit and stand in judgment.

That plaintiffs and defendant being public officers—branch pilots of the Port of New Orleans—were incapable of entering into any contract of co-partnership relating to their offices and to the performance of their duties. That plaintiffs are without authority and the Court without jurisdiction to interfere with, regulate, hinder or prevent the performance of defendant's official duties as a branch pilot of the Port of New Orleans.

Coupled with this exception was the answer which, in effect, was a general denial, and an admission that defendant signed the contract set out in the petition, but denied that the same was binding upon him.

From a judgment in favor of plaintiffs, decreeing a specific performance of the contract and perpetuating the injunction, the defendant has appealed.

The provisions of the contract which the defendant is charged with violating, are mainly these: That it was stipulated that all the earnings of any member of the association, growing out of the pilotage of vessels, should be paid into the common fund of the association, to be distributed, as to the profits accruing, *pro rata* among the members.

That each member should bring to the business of the association his time, skill, labor, etc., and should not carry on, on his own account or in conjunction with others, any business in the nature of piloting, or of a like character, with that of the association.

It is charged that the defendant has violated these articles of the association by refusing to perform duty on the vessels of the association; that he procured a small open boat, and prosecuted the business

of piloting on his own account, in disregard of his engagements as a member of said association, and in contravention of the laws of the State.

There is no dispute touching the acts of the defendant in this connection. They are virtually admitted and justified, on the ground embraced in the exception, that the articles of the association were not binding on him, but opposed to law and public policy and, therefore, void, and this is the question to be determined.

The Branch Pilots of the Port of New Orleans have been held by this Court to be State officers. 14 An. 7; 33 An. 230.

We have been presented by the defendant's counsel with an array of authorities in support of his proposition, that such officers cannot enter into a partnership for the purpose of pooling their earnings and regulating their duties.

Even admitting this principle is applicable to a class of persons who, though termed State officers, discharge functions that have no apparent connection with any of the several departments of the State government, yet it is contended that the statutes providing for the appointment of Branch Pilots, and defining and regulating their duties, authorize and provide for such an association or partnership as we find in this case.

The provision referred to is found in Sec. 2707, R. S., which is in these words:

"The duly licensed branch pilots of the port of New Orleans may, for the furtherance of their interests, form themselves into one or more voluntary private associations."

The second article of the said association or partnership accordingly declares that:

"The objects and purposes of the said partnership shall be to mutually protect the common interest of the said partners thereto in the pursuance of their profession as branch pilots of the port of New Orleans."

The reading of the sections of the law relating to the appointment and duties of these pilots, and the contract referred to, points out very clearly the interests sought to be protected by this agreement. For instance, the law makes it imperative upon each pilot to be the owner or part owner of at least one decked pilot boat of not less than fifty tons burden; and a pilot not owner of such a vessel is to be suspended from his office. R. S. 2703.

It might well happen that a pilot, though otherwise competent and qualified, might not be so fortunate as to own in whole or in part the vessel required. Ample provision is made for such contingency in the

articles in question. A number of vessels, valued at $63,000, were contributed by certain members of the association, and became the joint property of all, thus enabling each one of them to meet the statutory requirement referred to.

As it was evident that the business of the licensed pilots, relating to the duties imposed upon them would be large and, at times, complicated, difficult to be attended to individually, a general agent and manager was appointed, under an article of the partnership, with an office in New Orleans, to whom such matters were assigned.

We need not further particularize, but it is evident that the interests of the pilots were sought to be provided for in these articles of association. We have examined each of them minutely, and do not find that any of them are in conflict with the provisions of the law regulating the duties or business of the pilots, but, on the contrary, are designed and calculated to enforce the legal regulations, and add to the efficiency of the service required thereby.

It is, however, contended by the defendant's counsel, that the section of the statutes referred to, authorizing the formation of associations for the furtherance of the interests of the pilots, meant only associations for benevolent purposes. We do not so construe the language of the statute. No legal authorization would be needed for any purpose of that kind, and an attentive examination of the law on the subject leads to the conclusion that the language referred to had a broader significance, and referred to material interests, and not merely to those pertaining to benevolence or humanity.

For instance, Sec. 2709 provides that "any branch pilot piloting any vessel from sea and giving satisfaction shall have a preference in piloting her out to sea again, *provided* he or a pilot from the *same association* shall be in readiness and offer his services, etc." Why should the law concern itself with thus guarding a material interest of the contemplated association or associations, if its true interest was that the formation of such organizations had no connection whatever with such interests, and was in no manner designed to further or protect them? Nor do we find any more force in the suggestion, that its meaning might have been to authorize the creation of corporations to carry out the objects desired, and not partnerships. We do not perceive how, forming themselves into a corporation for the same or like purposes, the association of the pilots would have been any less amenable to the objections urged against the partnership. If the partnership was illegal, we cannot see why a corporation, under the same conditions, would have been any less so.

The law expressly licensed the pilots to form associations for the

furtherance of their interests; that much granted. It was not a matter of much moment how this association should take place, or by what name it should be called. Whilst every association of persons does not imply a partnership, it is certain that every partnership implies an association. In this instance, as in so many others, we find nothing in the name.

There being nothing in these articles that contravened the law or its policy, the contract between the parties became a law unto themselves, binding in every respect, and which they could not violate with impunity. And recognizing this contract as a legitimate contract and as specially authorized by law, it is the duty and province of the courts to protect the rights of parties thereunder from infringement, and enforce its performance under a proper showing. We know of no principle of law that would deny the power of the courts to do so, and we do not recognize the authorities cited by the defendant's counsel as having that effect, or as applicable to the circumstances of this case.

We think the plaintiffs have fully shown that they are entitled to the relief asked, and that the judgment of the lower court, in granting that relief, was correct; and that judgment is affirmed with costs.

ON REHEARING.

FENNER, J. The correctness of our former opinion on the question of the legality of the contract of partnership herein involved is not called in question; but, its legality being conceded, the point urged upon our notice is that, under our system, such a contract cannot be specifically enforced.

It is not denied that, under the Roman, as well as under the common law, obligations to do or not to do, arising from contracts, were enforced, not specifically, but only by way of damages. The maxim was, "*nemo potest præcise cogi ad factum.*"

The like rule was expressly embodied in the Napoleon Code, of which Art. 1142 provides: "*Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur.*"

Our own Code, however, contains the following provisions:

"Art. 1926. On the breach of any obligations to do or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, etc."

"Art. 1927. In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the

contract, he may be constrained to specific performance by means prescribed in the laws which regulate the practice of the courts."

"Art. 1929. If the obligation be not to do, the obligee may also demand that the obligor be restrained from doing anything in contravention of it, in cases where he proves an attempt to do the thing covenanted against."

That these articles apply to contracts of partnership, as well as to other contracts, sufficiently appears from the generality of their terms, as well as from the provision of Art. 2803. The pretension that Art. 2862 is inconsistent with this position, is without foundation.

The mere reading of the Articles quoted refutes the major portion of the argument for rehearing, and establishes, beyond controversy, that, in proper cases, the Courts of this State may and should enforce specific performance of contracts by both mandatory and injunctive relief.

The reader of the Articles must be struck with the perfect similarity of the ground stated for this relief, viz: where damages "would be an inadequate compensation," to the main foundation of equity jurisdiction of specific performance under the English law, viz: where the legal remedy (which is in damages) would be inadequate. 2 Story on Eq., §§ 717, 718; 1 Fonbl. Eq., Bk. 1, ch. 1; Fry on Spec. Perf., § 11, etc.

In determining, therefore, what are proper cases for specific relief, the equity jurisprudence of England and this country may be instructively consulted. How far our Courts should follow that jurisprudence is a question to be determined in cases as they arise. We have no occasion now to say more than that, in administering such relief, in cases of obligations *to do*, we should be guided by that respect for individual liberty which is an ennobling characteristic of our remedial system, so far as obligations *not to do* are concerned, the remedy by injunction is explicitly pointed out by Art. 1929, in cases properly covered thereby.

To come now to the instant case.

The contract, of which performance is sought, contains obligations both *to do and not to do*. Thus, it provides that "each partner shall bring to the business of said firm, all his time, skill, influence, attention and labor." Here we have an obligation *to do*, of a character specific performance of which is obviously non-enforcible, because involving the exercise of skill, good-will and like qualities inherent in the volition of the obligor, the exercise of which courts have no power of compelling. Fry on Spec. Perf. §§ 39, 40, 48, 50, 56, 58, 59, and authorities there cited.

So far as our former decree involved specific performance of this obligation, it was error and must be corrected.

The contract also included the following distinct obligation *not to do.* "No partner shall have the right to enter into and carry on any business of a like nature with the business of this partnership, whether for his own account or in conjunction with others."

Why should not the obligor be "restrained from doing anything in contravention of this obligation," under the terms of C. C. Art. 1929? We see no reason. Lawful contracts have the effect of laws as upon the parties to them. Therefore, it is the legal duty of the obligor to comply, the legal right of the obligee to exact compliance; and a violation thereof is "injurious to plaintiff and impairs a right which he claims," and is, therefore, a proper subject for injunction within the very terms of Art. 296, Code of Practice.

It is true that it was the ancient doctrine of English equity and is, perhaps, still that recognized in this country, that "when the positive part of an agreement could not be performed by the court, it would not enforce the negative part by injunction." But to this rule there was always an exception, universally recognized, in the case of the contract of partnership, as to which it is well established, from an ancient date, that "where a partner agreed to exert himself for the benefit of the concern, and not to carry on the partnership trade except as a partner, the court would, if the partnership was subsisting, enjoin against a breach of the last stipulation, though it certainly could not enforce the former." Morrison vs. Coleman, 18 Ves. 437; Kemble vs. Kean, 6 Sim. 333; Whitaker vs. Howe, 3 Beav. 383; Willard's Eng. Jur. p. 277; Fry on Spec. Perf. §§ 230, note, 556, 557, note.

This is precisely the instant case, and we see no reason why a like principle should not be applied under our law.

We find no merit in any of the other objections to our former decree.

We do not consider that the penal clause attached to Art. 7 of the contract affects the right to the remedy by injunction. Fry on Spec. Perf. § 66 *et seq.*

It is matter of course that the injunction will remain operative only during the existence of the partnership, and in case plaintiffs should claim its dissolution, that would end the injunction. As we must amend, we will guard this point, though, perhaps, unnecessary.

The reserve of right to claim damages applies, of course, only to damages inflicted by past illegal acts, and is not objectionable.

There is nothing in the objection that a public officer is enjoined from performing the duties of his office. The way to their performance, in the only proper and lawful mode, is left open to him.

The judgment must be restricted to the relief by injunction, and our former decree must be amended in that respect.

It is, therefore, ordered that our former decree herein be annulled and set aside; and it is now ordered, adjudged and decreed, that the judgment appealed from be now amended by striking therefrom the words: "And that the said Bernard Michell be decreed to fulfil and carry out all of his said obligations under the said agreement;" that it be further amended by inserting therein, after the words, "that the writ of injunction herein issued be made perpetual," the words, "to be operative, however, only during the continued existence of the partnership;" and that, as thus amended, the same be affirmed, plaintiffs and appellees to pay costs of this appeal.

No. 8865.

THE MUTUAL NATIONAL BANK VS. KEENAN & SLAWSON.

Compensation cannot be validly set up in extinguishment of a claim for the price of commodities sold for *cash*, where possession of the same was obtained by an artifice or breach of trust.

The purchase price, payable *cash*, must be *paid* under the agreement.

Compensation rests essentially on good faith, and cannot take place against a claim for the restitution of a thing of which the owner has been unjustly deprived.

Article 1292, C. N., is identical with Article 2210 of our Code, and the authorities agree in that sense. Rulings in 6 An. 46, 207, 356; 7 An. 53; 28 An. 629, and other cases, affirmed.

APPEAL from the Civil District Court for the Parish of Orleans. *Houston*, J.

T. H. Kennedy for Plaintiff and Appellee:

Compensation is not allowable against the vendor in a cash sale. 28 An. 627; Marcadé, Vol. 4, pp. 626, 627; No. 1, p. 629; No. 5 on Art. 1293, Code Napoleon; 18 Laurent, p. 468, and 2d note.

Blanc & Butler for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to recover the price of cotton sold for cash. The defence is compensation. From a judgment adverse to them the defendants appeal.

The following are the facts proved. On December 12th, 1881, Ben Gerson & Son drew a sixty days' note for $3,000 to the order of defendants, who endorsed it for accommodation. The note was used by the drawers. A few days previous to its maturity, learning that Gerson

& Son were in failing circumstances and would not take up the note, the defendants, through a broker who did not disclose them as his principals, bought from Gerson & Son 51 bales of cotton for $2,410.70, which they had under their own control.

The sale was made for cash, with special provision that $2,000 would be paid before 3 P. M. the same day, February 8th, 1882. When that hour came, the broker informed Gerson & Son that the amount would not be forthcoming, and that the cotton had been bought for Slawson. Gerson & Son then replied that the sale was cancelled. Later in the day Gerson & Son ascertained that the purchaser was one of the defendants. An attempt by Gerson & Son to sell the same proved unsuccessful, the defendants refusing to deliver it.

On February 14th, 1882, the $3,000 note maturing, the defendants took it up.

It appears that on the 4th of February Gerson & Son, who were indebted to the plaintiff Bank for advances, gave them an order for the cotton, but this order was not used.

Subsequently, no material circumstance having intervened between Gerson & Son and the defendants affecting the cotton transaction, the former, on March 31st, 1882, transferred to the plaintiff Bank their rights under it against the defendants.

The plaintiff Bank now sues, under that transfer, to recover the price of the cotton, $2,410.70.

The defendants, after pleading the general issue, and admitting the cotton transaction, allege the note of Gerson & Son endorsed and paid by them, and plead the amount thereof, $3,000, in compensation of the demand. They finally charge the simulation of the transfer, and conclude, praying for judgment under the issues.

It appears that on the trial of the case, the defendants, treating their answer and its averments as being a revocatory action, offered evidence to show knowledge in plaintiff of Gerson & Son's insolvency, unjust preference, and consequent injury to them, but the Court refused to admit the proof offered as irrelevant under the pleadings, and bills were reserved.

The answer contains no charge to justify the evidence, and no prayer to warrant a judgment upon it.

The court ruled correctly.

Under the facts as found, the only question presented is one of law: whether the compensation set up can avail?

The defendants urge, with great force, that the plaintiff Bank stands, under the transfer, in the shoes of Gerson & Son; that the transfer cannot prejudice them, and that, as before it took place, the

claim of Gerson & Son against them for the price of the cotton had been extinguished by compensation, the plaintiff Bank acquired nothing under the transfer.

The argument is solid in appearance only. It is significant that on the 8th of February, when the cotton was sold, the $3,000 note was not due; that it matured on the 14th, subsequently, when it was taken up; that previous to the purchase of the cotton, the defendants were well aware of the insolvent circumstances of Gerson & Son.

It was for the purpose, therefore, of covering themselves against the payment of a claim not in existence, conditionally so, and which, under any aspect, was not exigible, that the defendants purchased the cotton.

The law requires the co-existence of three conditions in order that compensation may be set up: 1st, Both debts must have the same object. 2d, They must be liquidated. 3d, They must be exigible.

If they were not exigible, that one of the debtors, who would not be bound to pay actually, would find himself, by the fact of compensation, deprived of the benefit of the term of credit. Mourlon 2, p. 756, No. 1443; Pardessus Dr. Com., Vol. 1, No. 250.

Speaking on the subject of compensation, Pardessus Dr. Com. says, Vol. 1, p. 282, No. 235, §2, "Cette compensation doit être offerte de bonne foi. Ainsi l'on ne pourrait trouver ce caractère dans la conduite d'un créancier qui achêterait chez son debiteur des marchandises qu'il feindrait de vouloir payer comptant et qui après en avoir fait l'enlèvement, n'effectuerait pas le paiement, mais exciperait d'une compensation. Il en serait de même de celui qui, empruntant, comme pour un besoin extrêmement pressé, une somme qu'il promettrait de rendre incessamment, refuserait ensuite d'exécuter cet engagement, sous le prétexte que le prêteur est son redevable. Ces sortes de ruses sont indignes de la bonne foi du commerce. Le créancier doit agir directement et les tribunaux n'accorderaient point, dans ce cas, un succès préparé par un véritable abus de confiance."

In support he refers to a decision of the Court of Cassation. See also Merlin Vo. Compensation, §2.

This Court has emphatically recognized and applied those principles in the following cases which it is unnecessary to analyze. Haydel vs. Roussel, 1 An. 35; Yale vs. Nolan, 3 An. 449; Nolan vs. Shaw, 6 An. 46; McKee vs. Amonett, Ib. 207; Rhodes vs. Hooper, Ib. 356; Breed vs. Purvis, 7 An. 53; Bogert vs. Egerton, 11 An. 73; Vincent vs Gandolfo, 12 An. 526; Guillebeau vs. Melançon, 28 An. 629.

The doctrine rests upon the principle clearly announced in Article 2210, R. C. C., which is to the effect that compensation shall not take

place against a claim for the restitution of a thing of which the owner has been unjustly deprived. This Article is found in the N. C. as Article 1292.

The notes upon it treat the party who has obtained the unjust possession of the thing of which restitution is asked, as a spoliator.

Bigot Preameneu says: "La compensation ne peut être opposée par celui qui est spoliateur d'une chose, à la demande qui lui en est faite. Le spoliateur ne peut sous quelque prétexte que ce soit, être autorisé à retenir ce qu'il a volé; l'ordre public l'exige."

Delvincourt says: "Quoique la compensation s'opère de pleine droit, le spoliateur n'y est pas recevable. *Spoliatus ante omnia restituendus.*"

There can surely be no escape from the operation of such principles in a case like the present one, in which the creditor, setting up compensation, had undoubted knowledge of the insolvency of his debtor, and by a preconcerted artifice, unjustly deprives his debtor of property of which he otherwise would not have obtained possession, and this with the view of paying himself and securing an undue preference.

If it be true that the defendants could not have set up compensation against Gerson & Son, had they been the actual plaintiffs herein, how can the defendants pretend that they can do so against a third innocent party?

There being no error in the judgment appealed from, it is affirmed with costs.

No. 7687.

W. S. Beers vs. The Board of Health et als.

The law is not, if a party threatens another with the commission of a wrong, unless he does an act which he is not obliged to do, that such party has a right to commit the wrong, and that the injured party cannot recover damages.

The authorities agree that, after a wrong has been committed, the damaged party shall not increase it, and that, if he does, he shall have no right to complain for loss or injury sustained in consequence of his wilful acts of commission or omission.

Damages can be recovered from an officer, although apparently acting in the discharge of official functions, for the execution of an order of his, which was unauthorized, arbitrary and wrongful.

The President of a Board of Health, ordering the fumigation of a vessel carrying a cargo of fruit, is personally answerable in damages where he thus acts under his declared personal responsibility, without authority from law or the Board, and arbitrarily; and where the cargo was in consequence damaged.

Where witnesses, who belong to the same trade and business, testify as to the value of articles within their line, the safe rule is to allow the lowest estimate.

APPEAL from the Sixth District Court, for the Parish of Orleans. *Rightor, J.*

Geo. L. Bright for Plaintiff and Appellee.

Breaux & Hall for the Public Administrator, on the same side.

F. C. Zacharie and *T. H. Kennedy* for Defendants and Appellees.

The opinion of the Court was delivered by

MANNING, J. The plaintiff sues the Board of Health, and the individual members thereof, to recover $3,598 as damages for injury to a cargo of fruit caused by fumigating the vessel at the quarantine station.

The schooner came from Port Antonio, Jamaica, where she took in this cargo of bananas in March, 1878, and arrived at the quarantine station April 3d. There was no yellow fever at that Port when she left, and no disease of any kind on the schooner then, or during the voyage, or at her arrival. The master of the schooner had a clear bill of health. The Governor had not issued his proclamation declaring any place infected. Yellow fever has never prevailed at Port Antonio. One case only is reported there, brought from elsewhere.

On the arrival of the schooner at the quarantine station the resident physician telegraphed the President of the Board of Health for instructions. It seems he was already under orders to fumigate vessels, since he stated to the President that the master insisted that fumigation would ruin his cargo, burning sulphur being the article used. Dr. Choppin telegraphed in reply ordering the fumigation, adding "fumes of sulphur do not injure fruit. Put carbolic acid carefully in bilge, but do not sprinkle it over fruit."

This order was obeyed, and the fruit was blackened. The cargo, valued at $4,375, sold for $839.50

The order was made by the President of the Board without its sanction, though his action was afterwards approved by the Board, one member only dissenting, and the plaintiff contends that this makes it the act of the Board, for the consequences of which the Board and each member thereof is responsible.

We do not think this sanction of the Board retroacts, and makes them responsible for the trespass of the President. The illegal act, if it were illegal, had been already committed, and they did not make themselves co-trespassers by a subsequent approval of it.

The defendant contends that the act was not illegal, but on the contrary was authorized under the power conferred specially upon the Board by the Act of 1876, whereby authority is given it to "disinfect, fumigate, and purify any vessel from ports in which yellow fever usually prevails, or from ports where other contagious or infectious diseases are reported to exist." Sess. Acts, p. 110. The hindrance to the

application of this law is the absence of that condition, the existence of which must form the basis and the justification of the Board's action. Yellow fever does not usually prevail in this Port Antonio, and no other contagious or infectious diseases were reported to exist there.

The power must therefore be derived from some other source, and we can find none unless it be in that clause of the law reorganizing the Board of Health, which authorizes it to establish quarantine stations upon any of the approaches to New Orleans, whenever in its discretion they may be necessary to protect the health of the City or the State, and to make all needful regulations for the management and police of these stations, and also provides a penalty for any master of a vessel who shall refuse to allow the quarantine officer to disinfect or fumigate his vessel. Sess. Acts 1877, Sec. 7, p. 119.

The Board had authorized its President to act in cases of emergency, and to report his action to the Board when it met. Under that authorization the President ordered the fumigation of this vessel without consulting the Board, and his action as already stated was approved. The physicians who were examined as witnesses say that yellow fever is endemic in the West India Islands, and that Jamaica is in the yellow fever zone, that is, that it is likely to appear there at any time, but there seems to be no doubt that it was not there when this schooner left. Certainly it was not at Port Antonio.

It looks like an arbitrary act to have ordered the fumigation of a vessel with a clear bill of health, coming from a port where there was and had been no sickness, before the proclamation of any port whatever as infected, and with a cargo, the marketable value of which would be destroyed by fumigation. Ignorance of the fact that it would destroy the cargo does not excuse the act, and although we feel that considerations of public policy are entitled to great weight, and the need to uphold the authorities in efforts to secure the public health presses with peculiar force upon us here, we should not be inclined to disallow a claim for damages so well founded as this is, had not the plaintiff refused to do or permit to be done what would have saved his cargo.

The health officer, on receiving Dr. Choppin's order to fumigate the schooner, suggested to the master to unload his cargo on the custom-house wharf at the quarantine station, and offered assistance to help the crew unload. This was done because the master persisted in saying that the fruit would be ruined, and an opportunity was thus given him to avoid the injury and loss which he apprehended. He asked who would pay for this unloading, and on being told he must pay the expense refused to do it, although he was convinced the fumi-

gation would destroy the saleable quality of his cargo. There were 1,750 bunches of bananas. What time it would have taken to unload, fumigate the vessel, and reload does not appear. The actual detention was a little over six hours. The expense could not have been very considerable, but whether little or much, could have been preferred as a claim for reimbursement.

The plaintiff resists this conclusion, arguing that it was rather the duty of the defendant to cease the continuance of his wrongs than the plaintiff's to give up acknowledged rights, citing Sutherland to that effect, and a Statute of Congress forbidding under penalty any vessel unloading before coming to the place for the discharge of cargo.

The Act of Congress might as well be held to apply to the partial discharge of cargo to lighten the ship at sea in a storm, as to a discharge for disinfection under quarantine or health laws, and the author cited continues the quotation from the Michigan Court in this wise:

"If a man tortiously injure the roof of my dwelling, and I obstinately leave it in that condition, and having the opportunity, refuse or neglect to repair, until the furniture and bedding in the house are injured or destroyed by the rains, I cannot recover of him for this injury to my furniture and bedding, which I might have avoided by timely repairs. And if a man comes to my field where my cattle are grazing and turn them out into the street and turn his own cattle in, thus ousting me from the possession, and claiming and holding exclusive possession against me, I cannot leave my cattle to starve on the street and charge him with their full value; * * * but I can recover only such damages as I have suffered, beyond what I might have avoided, by reasonable diligence."

The principle which we here apply is stated succinctly by the same author thus:

"If the plaintiff omit to use his opportunities and does not reasonably exert himself to lessen the damages, which may result from the defendant's act, he is not entitled to compensation for the injury which he might and ought to have prevented, except to the extent of proper compensation for such measures or acts of prevention as the case required and were within his knowledge and power." 2 Sutherland on Damages, 238. See also Levy vs. Car. Canal Co., 34 An. 180; Tardos vs. Jackson R. R. Co., not yet reported.

Judgment affirmed.

DISSENTING OPINION.

POCHÉ, J. The majority opinion in this case concedes to plaintiff all the facts which should have dictated a judgment in his favor.

The propositions of law which he advances in support of his demand are also sustained in a great measure.

The Court finds that the act of Dr. Choppin, in ordering the fumigation of the vessel, was not sanctioned by law, was not authorized by the Board of Health, and was not justifiable either by reason or justice. And yet the plaintiff is denied the just relief to which he is manifestly entitled, because he refused to tamely submit to a wrong for the purpose of avoiding a greater wrong. As it is conceded that the President of the Board exercised a power not vested in him by law, his liability must be tested by the same rule which would apply to a private citizen, who would have arbitrarily invaded the sacred rights of another.

Now, if the captain of this vessel had been overpowered by an armed body of men, who would have insisted on fumigating his vessel at the risk of damaging his cargo, and he had declined their proffered liberality of allowing him the time to unload and reload his merchandise, would his refusal be entertained for a moment as a proper defence in an action for damages against the wrong-doers? Evidently not.

I see no possible difference between such a case and the circumstances of this case, in which the conduct of the President of the Board is avowedly unjustifiable, unlawful and arbitrary.

The following principle enunciated by the Supreme Court of Michigan has a peculiar application to the present case, and should, in my opinion, have been applied in justification of the captain's refusal to unload his vessel:

"As to the question of duty, as well might it be said, if he had repeatedly assaulted and beaten me and my family, in my own house, and declared his intention of repeating the process as long as we should remain there, it would be my duty to remove myself and family from the house to avoid increasing the damage which might otherwise accrue from his further continuance or repetition of the like conduct."

I agree with my Associates in their conclusion exonerating the Board and its other members from responsibility in the premises, but in my opinion the President of the Board was undoubtedly responsible for all the damages suffered by plaintiff, who, like many other men engaged in commerce, will see very little encouragement to bring his vessels and cargoes to a port where he finds such little protection for his property and his sacred rights.

I, therefore, dissent from the decree rendered in the case.

Mr. Justice Todd concurs in this opinion.

CONCURRING OPINION.

FENNER, J. If the action of Choppin had been clearly wanton and arbitrary, I should doubt the applicability of the principle that plaintiff should lose his damages because he did not do what was possible to avert or lessen them. But Choppin's action was not of the character indicated, but was doubtless taken in the conscientious discharge of what he believed to be a grave public duty. Although the evidence taken after the fact, perhaps, establishes that Port Antonio was not infected with yellow fever, or usually subject thereto within the terms of the law, it is not to be forgotten that it lies within that extensive *nidus* of the disease which is professionally known as the yellow fever zone, in which, as a general rule, yellow fever is endemic. The exemption of this particular obscure port was an exceptional fact, of which Choppin was not bound or presumed to be aware. Nor was he bound to accept the mere assurance, to that effect, of interested parties, whose misrepresentation might expose an immense population to the calamities of pestilence.

Plaintiff had no reason to doubt that the health authorities, who were without private interest, were acting in good faith; and it was his duty to have done what lay within his power to avert damage, when offered the opportunity to do so.

I, therefore, concur in the decree herein.

ON REHEARING.

BERMUDEZ, C. J. The argument on the rehearing has failed to demonstrate that the Court erred in exculpating the members of the Board from the responsibility which was sought to be fastened upon them.

A review of the evidence shows that the Court had not misunderstood the facts, and that the same were correctly stated.

A reconsideration of the perplexing legal questions involved, having a bearing on this case, has, however, established that the plaintiff cannot be considered as having been in fault, as was first found, and that he was not, therefore, properly chargeable with contributory negligence in refusing to unload the fruit cargo, illegally ordered to be fumigated by the President of the Board of Health in his individual recognized responsibility.

The testimony shows that he refused to unload and declined to pay for the unloading, but it does not establish that he objected to its being done. After the fumigation, against which the plaintiff had entered a formal protest, had taken place, he did everything in his

power to prevent an aggravation of the wrong inflicted upon him, by endeavoring to realize for the damaged cargo as much as possible under the pressing circumstances of the time.

It is worthy of note, that when plaintiff's agent called on the President of the Board to prevent the fumigation, that officer remained deaf to the protest, and persisted in the execution of his instructions to the quarantine agents, saying that he was responsible for the act.

It is also to be observed that whatever may have been the authority of the President of the Board to cause vessels to be fumigated, there has been offered no justification for the fumigation of that portion of the craft in which the fruit had been stored--a thing, one of the witnesses says, which had never been heard of previously.

The authorities do not go to the length, nor could they, of saying that, if a party threatens another with the commission of a wrong, unless he do a certain act which he is not obliged to do, such party has a right to commit the wrong, and the damaged party cannot recover.

The authorities all concur in establishing the proposition that, after a wrong has been committed, the damaged party shall not increase it, and that if he do, he shall have no right to complain for loss or injury sustained in consequence of his wilful acts of commission or omission. Sedgwick, 7th ed., p. 170; 54 N. Y. 528; 43 Me. 578; 38 Iowa, 522; 45 Md. 136; 17 Pick. 284; 1 Md. 329.

Liability attaches in such a case as this, as the act done, and which occasioned the loss, was unauthorized, arbitrary and wrongful.

The testimony shows that there were 1,750 bunches of bananas of a superior quality on board the vessel, and in excellent condition when it reached the quarantine; that there was a scarcity of such fruit on the market where it was in demand, and that, had the cargo not been fumigated and consequently damaged, it would, on its arrival here, have realized quite a high price, some witnesses say as high as $3 a bunch. In cases of this description, however, it is not safe to accept blindly the highest estimate of witnesses belonging to the same trade or business, for there exists among them a certain *esprit de corps* which has to be guarded against, and which materially reflects upon and affects their evaluation. The safe rule in such cases is to adopt the lowest estimate. The testimony also shows that in ordinary times a bunch of bananas realizes a dollar; but, that at the particular date of the arrival of the cargo, in this case, in New Orleans, the fruit would have realized $1.75 per bunch, if sound.

At that price the proceeds of sale would have amounted to $3,062.50 deducting therefrom $849.50 which the cargo brought, there remains a

balance of $2,223, which the plaintiff is entitled to recover as damages, but without interest.

It is, therefore, ordered that the previous decree herein made be annulled and set aside, so far as it affirms the judgment appealed from, in favor of S. Choppin, and it is now ordered and adjudged that the judgment appealed from, in so far as rendered in favor of Samuel Choppin, be and it is now reversed and avoided.

And it is now ordered and adjudged that the succession of William S. Beers do have and recover from the succession of Samuel Choppin, or its legal representatives, his widow in community and heirs, in the proportion fixed by law, half from the former and half jointly from the latter, each for his virile share, the sum of two thousand two hundred and twenty-three dollars ($2,223) without interest, and the costs in both Courts.

It is further ordered and adjudged that, in other respects, the previous decree herein remain undisturbed, and accordingly, that the judgment of the lower court, in favor of the other defendant, be affirmed at the cost of the cast defendant and his succession.

Mr. Justice Fenner and Mr. Justice Manning adhere to the original decree.

No. 8966.

THE STATE OF LOUISIANA VS. MOISE MORGAN.

An amendment allowed during trial, in a case of rape, substituting a different name to that of the person charged as having been ravished, with the object of substituting another person, affects the substance of the indictment and is not permissible under Sec. 1047, R. S. The District Court was right after verdict to quash the same.

APPEAL from the Twenty-fifth District Court, Parish of Lafayette. *Clegg*, J.

J. A. Chargois, District Attorney, for the State, Appellee.

D. Caffery for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The State appeals from a judgment setting aside the verdict of the jury sustaining a motion in arrest of judgment, in a prosecution of the defendant for the crime of rape.

The indictment charged the defendant with having committed the rape on the person of Marie Logan.

After arraignment and plea, the case was taken up for trial, and during the progress the trial and after part of the evidence had been

introduced, the District Attorney moved to erase the name of *Marie Logan* and insert instead the name of *Rose Bastian* as the true name of the person against whom the alleged offense was committed. To this change or amendment counsel of the accused objected, and upon the motion being granted, he reserved his objections, appearing in a bill of exceptions. The trial proceeded, and the jury returned a verdict of guilty, without capital punishment. Thereupon, a motion in arrest was made, substantially on the ground that the defendant had never been indicted for a rape upon Rose Bastian, had never been arraigned or pleaded to such charge, and that the amendment allowed during the trial was not merely to correct a description, or give the true name of the person alleged to have been injured, but to insert the name of a different person and, in effect, to institute a new and different prosecution from that originated by the indictment.

This motion was sustained, the verdict quashed, and the accused held in custody, to answer to the charge before another jury, after arraignment and plea.

The appellee asks for no amendment of the judgment.

It clearly appears from the record, that the amendment to the indictment was not merely to the effect of correcting an error or misdescription as to the name of the party upon whom the offense was committed, but, in point of fact, to substitute the name of a different person, so that the indictment, as originally found, charged that the rape had been committed upon one person—an actual living person—and as subsequently changed, that another and different person had been ravished. In other words, the error in the indictment was not merely as to the name, but really as to the person against whom the crime was committed.

The part of the Section (R. S. 1047) under which this amendment was moved, reads thus:

"Whenever, on or before trial of any indictment for any crime or misdemeanor, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof, * * in the name or description of any person, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offense; or in the christian name or surname, or both christian name and surname, or other description whatsoever, or of any person whomsoever therein named or described, * * it shall be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense, to order such indictment to be

amended according to the proof, * * the trial to be had before the same or another jury, as the court may think reasonable, etc."

It is evident from a reading of the above, that the statute only authorized such a change in an indictment, as to names, as would correct formal errors or misdescriptions in names attempted or intended to be set forth properly therein, and not to make radical and material changes as to persons, or things pertaining to the substance of the indictment, and by which the defendant might be prejudiced.

This is no new construction of the statute, but one in accord with repeated decisions of this Court. State vs. Nicholson, 14 An. 785; State vs. Cook, 20 An. 145; Ib. 408; see also, Wharton, Am. Crim. Law, 6th Ed., Secs. 250-256; Waterman, Archibold, (7th Ed.) 274.

The last authorities cited relate to the construction of the English statute, (14 and 15 Vict.) from which the Act of 1855 (R. S. 1047) was originally derived.

It is plain, that such a change, not merely of names, but of persons, amounting substantially to the substitution of one person for another, upon whom the offense was committed, would necessarily work to the prejudice of the accused.

Judgment affirmed.

No. 8973.

THE STATE OF LOUISIANA vs. EMILE DALON.

Act No. 98 of 1880, the object of which is to organize and put in motion the Criminal District Court for the Parish of Orleans, created by Article 130 of the Constitution, is not a *local* or *special law* and does not fall under the ban of the Constitutional prohibition embodied in Article 48.

It has but one object and that object is expressed in its title. 33 An. 783, affirmed.

If part of Section 4 be unconstitutional, the remaining is not assailable and constitutes the Section.

APPEAL from the Criminal District Court for the Parish of Orleans. *Roman*, J.

J. C. Egan, Attorney General for the State, Appellee.

L. Marrero and *J. M. Pratt*, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant was convicted of arson. He appeals from the verdict and judgment thereon sentencing him to fifteen years at hard labor.

His challenge to the array, which was overruled by the court, assails the constitutionality of Act No. 98 of 1880, on these grounds:

1. That it is a local or special law which was not notified and published, as required by Article 48 of the Constitution in force; and

2. That the Act embraces more than one object, in violation of Article 29 of the Constitution.

3. That Section four of the Act is unconstitutional, and being so, the other Sections of the Act become inoperative and are of no effect.

I.

The Act was designed to organize the Criminal District Court for the Parish of Orleans, as established by Article 130 of the Constitution, by providing for and regulating the machinery indispensably necessary to put that Court in motion, and thus preserve public order and general welfare and tranquility. It has no private or local good in view, but aims solely at the enforcement of the laws enacted for the prevention and punishment of crime. It is a public, a general act, which regulates the common good of each and every member of the human family within the limits of the State.

The words "*local*" or "*special*" are clearly used in contradistinction of the word "*general.*" There being no power to enact local or special laws, on subjects not enumerated in Article 46, *unless* after notice and publication, it is clear that the only laws which the legislature can pass must be general in character.

"General laws are said to be those which relate or bind all within the jurisdiction of the law making power, limited as that power may be in its territorial operation or by constitutional restraint." Sedgwick on Const. Stat. Law, p. 30.

"The number of persons upon whom the law shall have any direct effect, may be very few, by reason of the subject to which it relates, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides." People vs. Cooper, 83 Ill. p. 589.

"Those are to be regarded as public acts which regulate the general interest of the State or of any of its divisions." New Portland vs. New Vineyard, 4 Shep. 69.

"A public act is a universal rule that regards the whole community." Stephens Comment. Vol. 1, p. 67; Kent, Vol. 1, p. 506; Dwarris on Stat. p. 629.

"An Act is *general* within the meaning of the Constitution, which, in its subjects, relates to all the people of the State, or their property, though its operation be not equally applicable to all the parts of the

State. *Local* acts are such as are confined to the persons and property, both of a specific locality." Kerrigan vs. Force, 16 N. Y. 185.

"The word *local*, as applied to a bill, to an act, to a law, means such bill, act, or law, as touches but a portion of the territory of the State, a part of its people, a portion of its citizens.

"An Act is local within the meaning of the Constitution, which in its subjects, relates to but a portion of the people of the State, or to their property and may not, either in its subject, operation, or immediate and necessary results, affect the people of the State, or their property in general." People vs. Supervisors, 43 N. Y. 7, 16; see also, 10 Wis. R. p. 178; 4 Blatchf. 236; 9 Wis. 279; 70 Ill. 398.

The Constitution now in force contains two Articles on the subject of *local or special* laws: Article 46, which prohibits peremptorily such legislation on the subjects specified, and Article 48, which forbids the same on subjects not enumerated in Article 46, *unless*, after publication of an intention to apply for the passage thereof; the last Article being, therefore, permissive of such legislation, where the intention was published and that fact is shown, in the manner directed.

A moment's reflection satisfies the mind that the intention to apply alluded to, can only mean that of private individuals seeking some private advantage or advancement for the benefit of private persons or property within a certain locality.

It is manifest that the Act assailed was one of indispensable necessity to put in motion a court created by the Constitution, and which, without such legislation, would have remained lifeless and cumbersome.

If the attack on the Act has any force, the conclusion would be unavoidable that, as long as no one would conceive the idea of memorializing the legislature for the adoption of such an Act and publish such intention *at his cost*, the Criminal District Court, created by the Constitution and designed to prove of such great public service, would continue in perpetual inactivity, impotent to afford the effective protection which society expects from the exercise of its solemn powers. The mere announcement of the proposition carries its refutation.

A review of the authorities leads to the irresistible conclusion that the Act in question, which is in character one eminently public and conservative of individual security and general welfare, and which was essential for the discipline of a judicial organization created by the Constitution and for the administration of criminal justice in the most important subdivision of the State, does not fall under the ban of constitutional proscription, and is, therefore, constitutional and valid, and must be enforced.

The argument, that a law which relates solely to the machinery of a

court of justice having jurisdiction over the territory of one parish only, is a *local* or *special* law, because it does not operate throughout the State and all the parishes thereof, is perfectly preposterous, and so hollow that it cannot stand criticism.

The real distinction between public or general laws and local or special laws is, that the former affect the community as a whole, whether throughout the State or one of its subdivisions; and the latter affect private persons, private property, private or local private interests.

II AND III.

The second objection which goes to the constitutionality of the very Act in question, has already received judicial consideration and determination, as not being unconstitutional, on the score that it violates Article 29 of the Constitution, which prescribes, that every law shall embrace but one object, and *that* shall be expressed in its title. State vs. Crowley, 33 An. 783.

The ruling in that case is correct, and is affirmed as such.

It is not exact to say that we there decided that Section four of the Act is unconstitutional, for we did not do so. We merely hypothetically said, that if it were, this would not render the entire Act unconstitutional, inasmuch as every other part or section of the Act remains covered by the title.

Indeed, that portion only of the section which refers to the drawing of juries for the Civil District Court for the Parish of Orleans would be the part affected, and would be considered as never having been enacted or incorporated in the law. The remaining portion of the Section concerning the jury wheel or box, which is to be emptied or refilled by order of either of the Judges of the Criminal District Court, would continue in force and operate as Section *four*.

We therefore conclude, that Act 98 of 1880 is not unconstitutional, as charged, and that the District Court did not err in overruling the challenge to the array.

Judgment affirmed.

No. 8857.

In Re Fazende & Seixas, Praying for a Monition.

On Motion to Dismiss.

Although a tran cript contain neither note of evidence, statement of facts, bill of exceptions or assignment of error, the appeal will not be dismissed, if the clerk's certificate is complete and declares that it contains "all the testimony adduced." In such case, the court, without assignment, may inquire if there is error apparent on the face of the record.

On the Merits.

An opponent in a monition proceeding, is in no case required to make an antecedent tender as a condition precedent to opposing confirmation of sale.

Where he has engrafted on his opposition a petitory action, although the exception of want of tender may avail to dismiss the latter action, it should be restrained in its effect to this extent, and should not operate as a dismissal of the opposition.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

J. J. Barnett for Opponent and Appellant:

1. Plea of want of tender, as a prerequisite to the opposition of a monition, which opposition involves a petitory action, cannot be made by a warrantor after the applicant for monition has joined issue with the opponent, and from his answer, it appears that the tender would be a vain thing. 8 La. 252; C. P. 333, 336, 345, 346.

If such a plea be sustained at all, it should only have effect as to the warrantor excepting.

2. Where there is a plea of the kind, it should be made to appear that something, and what did enure to opponents' benefit, and should be tendered. The burden of proof is on exceptor. 30 An. 310.
3. When an execution sale, not advertised for the term required by law, is alleged to have been made, "also by consent of parties," such sale is not a "judicial sale." 2 An. 174; 3 An. 192; 16 An. 167.
4. If there be no consent, and failure of advertisement, as aforesaid; the resulting nullity is absolute. 1 R. 331; 2 R. 326; 5 La. 486.
5. Where such nullity is absolute, tender antecedent to the petitory action is unnecessary; defendant may urge his claims by reconvention. 33 An. 750-773.
6. A petitory action may be engrafted upon an opposition to monition; the opposition to monition is a provoked suit; and where in opposing, it is essential to allege ownership, and incidentally to claim property illegally divested, no preliminary tender is necessary. 13 La. 560; 34 An. 257.
7. In a petitory action it may be decreed that plaintiff only have possession upon reimbursing to defendant whatever amounts enured to his benefit. 2 La. 326; 3 La. 541; 30 An. 310; 34 An. 257.
8. If a petitory action cumulated with an opposition to monition be dismissed for want of tender antecedent to the suit on opposition, or because such action could not be cumulated with the opposition; proper judgment is one of "non suit," with reservation of rights as to that portion of the opposition which claims ownership; and reference for trial of the simple opposition to monition.

E. H. Farrar, A. G. Brice and *H. G. Morgan* for the Appellees.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

FENNER, J. The motion is based on the ground that there is "no note of evidence, no bill of exceptions and no statement of facts in the record," and that appellant has not, within ten days after bringing up of the record, filed any written assignment of error.

The certificate of the clerk attached to the record is full to the effect that the transcript contains "a true, correct and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause."

We think that this destroys the motion.

We consider that Articles 896 and 897 of the Code of Practice are to be construed together, and that the conditions expressed in the beginning of Art. 896 in the words "if, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court as containing all the testimony adduced," extends to and covers all the provisions of both Articles. We hold the meaning and effect of the two Articles to be, that, *in the absence of such certificate*, the Supreme Court can judge of the cause only: 1, on a statement of facts; 2, on a bill of exception; 3, on a special verdict, or, in absence of all these; 4, on assignment of error on face of the record filed within the ten days.

If, on the contrary, the transcript presents such a certificate, then the provisions of those Articles have no application, and the Court will entertain the appeal. Reeves vs. Gordon, 5 La. 288; Erwin vs. Orillon, 6 La. 205; State vs. Giffen, 15 An. 420; Bossier vs. Carradine, 18 Id. 261; Cammack vs. Gordon, 20 Id. 213.

The motion to dismiss is, therefore, denied.

ON THE MERITS.

The applicants for monition acquired at a judicial sale in the case of Bouny vs. Hernandez. Hernandez had acquired at a judicial sale in a case of Frellsen vs. Baldwin et al. The monition proceeding seeks to establish the regularity of both these sales.

Mrs. Johnson, who was one of the defendants in the earlier suit of Frellsen vs. Baldwin et al., files her opposition in the monition proceeding, and avers, as grounds thereof, certain defects and irregularities in the executive proceedings. She further engrafts upon her opposition a regular petitory action setting forth title in herself and praying for judgment decreeing her to be the owner of the property. For the defense of this demand, plaintiffs in monition called in warranty Bouny and Hernandez, and the latter in turn called in warranty Frellsen and the defendants in the first suit.

Frellsen appeared and filed sundry exceptions to the demand of Mrs. Johnson, the last of which was "that the heirs of a mortgage debtor cannot annul a sale of mortgaged property made to pay the debt of their ancestor and recover back the property sold, without first tendering to the purchaser the price that he has paid for it, and that opponent herein cannot escape this obligation and tender, by engrafting a petitory action upon a monition proceeding."

After trial, judgment was rendered decreeing that the above exception "be maintained, and accordingly that said opposition be and the same is hereby dismissed," from which judgment Mrs. Johnson has appealed. There is no evidence and no note of evidence in the record, as heretofore indicated, and appellant claims that the judgment should be reversed for want of proof of the *facts* on which the exception is based. It seems, however, too well established that at least in cases where evidence is necessary, in absence of any note of evidence, the Court will presume that the lower court proceeded on proper evidence.

Simmons vs. Howard, 23 An. 504; 22 An. 73, 118; 23 An. 446, 393; 26 An. 148, 734; 34 An. 631.

We must, therefore, confine ourselves to questions of error of law apparent on the face of the record.

While we are not prepared to say that, under some state of facts which may have been established, the plea of want of antecedent tender may not have been well taken as against the petitory action of Mrs. Johnson, we think the judgment dismissing absolutely her opposition was erroneous.

Her petition is to be regarded in a double aspect: 1, as an *opposition*, properly so called, showing "cause why the sale should not be confirmed and homologated," (Rev. Stat. Sec. 2371); 2, as a petitory action.

The monition is a voluntary proceeding on the part of the purchaser of property by which, in the words of the law, he "calls on all persons who can set up any right to the property in consequence of, etc., to show cause within thirty days why the sale so made should not be confirmed and homologated."

In responding to such a voluntary call by a purchaser, the law does not, expressly or by implication, impose upon a party the necessity, in any case, of making an antecedent tender.

The injustice of dismissing entirely her opposition and subjecting her to the injury which may result from the confirmation of the title of plaintiffs is apparent. We must not be understood as intimating any approval of the practice of engrafting the petitory action upon an opposition in a monition proceeding. In this case an exception to the propriety of such proceeding had been taken and overruled, from which

judgment no appeal had been taken. That question is not, therefore, before us.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from, in so far as it dismisses the opposition of Mrs. Johnson absolutely, be amended by restricting such dismissal to the petitory action engrafted on said opposition, without prejudice to her right to prosecute the same as an opposition proper, and that in other respects said judgment be affirmed and that the cause be remanded to be proceeded with according to law. Costs of appeal to be paid by appellees.

No. 8968.

THE STATE OF LOUISIANA EX REL. GERVAIS LECHE, DISTRICT ATTORNEY ET AL. VS. GEORGE GEIER, TREASURER OF JEFFERSON PARISH, LEFT BANK, ET AL.

The Statute expressly requires that the taxes levied by the police jury for school purposes shall be paid over by the tax collector directly to the treasurer of the parish school board.

Where the tax collector has unlawfully paid over such funds to the treasurer of the police jury, the duty to pay over to the school treasurer passed, with the funds, to the treasurer of the police jury, and, on his refusal, is the proper subject of enforcement by mandamus.

APPEAL from the Twenty-sixth District Court, Parish of Jefferson. *Hahn*, J.

Gervais Leche, District Attorney, and *James D. Augustin* for the Relators, Appellees.

A. E. Billings and *Alfred Shaw* for Respondents and Appellants:

Mandamus issues where the law has assigned no relief by the ordinary means. C. P. 830; High, Secs. 15 and 30; 26 An. 259.

The law (Act 23, 1877, p. 36, Sec. 28) provides in what contingency the police jury shall levy a tax and how it shall be collected and paid. Such requisition cannot be implied, but must be actual and positive, and should be alleged.

It being the duty of the tax collector to collect and pay, the proceedings to effect such object should be against him. It is not the duty of the ex or parish treasurer to render any account to the school board, or for the ex-treasurer to pay out anything, and they cannot be mandamused to perform what is not their duty. High, Sec. 37.

A mandamus will not lie to compel an officer to pay what he ought to have in his hands, but only what he has in his hands. State ex rel. Merle and Chapus vs. Dubuclet, 26 An. 127.

The right to it must be clearly established. High, Sec. 9.

First, it must appear that the relator has a clear legal right to the performance of a particular act or duty at the hands of the respondent; and, second, that the law affords no other adequate or specific remedy. High, Sec. 10; State ex rel. Fix vs. Herron, 29 An. 850.

The opinion of the Court was delivered by

FENNER, J. Relators, representing the School Board of the Parish of Jefferson, aver, in substance, that a tax of two mills on the dollar

for school purposes had been levied by the Police Jury of the Parish of Jefferson, left bank, for the years 1881 and 1882; that the same had been collected by the sheriff and *ex-officio* tax collector of the parish; that under the law it was the duty of the said collector to pay over the said taxes directly to the Treasurer of the Parish School Board; that, in violation of law, the said collector had paid the same over to the Parish Treasurer; that this latter officer illegally holds the said funds, and refuses to pay them over to the Treasurer of the School Board, which it is his legal duty to do; wherefore, relators apply for a mandamus ordering him to perform said duty and make payment accordingly.

Numerous technical defenses are interposed, which, as the case is presented to us, have no force.

As defense to the merits it is urged:

1. That the School Board had never called on the Police Jury to levy a school tax for the years 1881 and 1882, and that no such tax was levied.

The evidence conclusively establishes that such tax was levied and collected and specifically paid over, as such, to the Parish Treasurer. The absence of a call for such levy by the School Board does not affect the case.

2. That defendant, in his official capacity, holds funds, of whatever character, only as the agent of the Police Jury, and cannot pay out except in compliance with their resolutions and warrants. The proposition, in a general sense, is correct, but it is without application to the case of parish funds like those presently concerned, which are assigned by law to the control and custody of other parish functionaries, and over which the Police Jury had not, and could never acquire any right of direction or control.

The law is clear and unambiguous that the "school tax so collected shall be paid over by the collector of parish taxes to the Treasurer of the Parish Board of School Directors, and shall by them be apportioned, etc."

If the tax collector, through misconception of the law or otherwise, has paid over these funds to a parish official different from the one designated by the law, the duty to pay over the funds to the latter passed, with the funds themselves, to the official so receiving, and is a proper subject of enforcement by mandamus.

3. That a portion of the funds so received by him had been actually paid out under direction of the Police Jury before this proceeding was taken, and is, therefore, no longer in his custody.

To this extent his defense to the proceeding by mandamus was properly maintained by the Judge *a quo*.

The evidence, however, conclusively shows that he still has in his actual possession $397.60 of those funds; and, to this extent, the mandamus was properly made peremptory.

The objection to our jurisdiction has been considered, but, as shown by our course, we deem it untenable, relators having claimed that more than sixteen hundred dollars were due.

The defendant must pay the costs of his appeal, but we think the costs of the lower court, having been incurred in procuring a judicial settlement of contested questions of official right and duty, were properly made payable out of the fund.

Judgment affirmed at appellants' cost.

No. 8658.

AREA & LYONS VS. RICHARD MILLIKEN.

Where the practice or custom of a factor is to insure consignments of produce, and this is brought to the knowledge of his consignor by uniform charges for insurance in his accounts rendered, the factor will be deemed to have continued that custom until he gives notice to the consignor of the change, and is responsible for any loss, consequent upon his failure to insure, before such notice reaches the consignor.

If the factor has been in the habit of insuring produce without instructions, and he deviates from it without apprising his consignor, and loss ensues, he will be liable.

APPEAL from the Civil District Court, for the Parish of Orleans. *Houston*, J.

Braughn, Buck & Dinkelspiel and *W. O. Hart* for Plaintiffs and Appellees:

1. A party who has been in the practice of insuring for another is presumed to have had proper authority, and cannot afterward omit doing so without informing the other; he will otherwise be liable himself. 6 M. 649; 6 La. 583; 2 R. 103; 73 Ill. 404; Domat 1, 15, Sec. 4, Art. 4.
2. The attorney is responsible, not only for unfaithfulness in his management but also for his fault or neglect. R. C. C. 3003.

Kennard, Howe & Prentiss for Defendant and Appellant:

1. The plaintiffs sue on a "verbal agreement" to insure the sugar in question consigned to defendant. The answer is a general denial, coupled with a special denial of any instructions from which such agreement could be inferred. No agreement has been proved, and the plaintiffs' claim should be rejected. Courtebray vs. Rils, 9 Rob. 513.
2. The defendant, as factor or mandatory of plaintiffs, in the absence of instructions, which absence is conceded, was bound to follow the customs of the mart and of his office—which were harmonious. Story on Ageny, §§ 96, 191; C C. 3000; Reano vs. Mayer, 11 Martin, 636; Goodenow vs. Tyler, 7 Mass. 36. By these customs, in such a case as the one at bar, no insurance was effected by the factor, nor were the goods covered by his open policy, unless special instructions had been given to so cover them.

3. The plaintiffs are presumed to know the usage of a port to which they ship goods for sale; 7 Mass. 36; and are held to have authorized their factor to act accordingly, whether they have or have not actual acquaintance with the rules that govern factors under such circumstances. Sutton vs. Tatham, 10 Ad. & El. 27; Bayliffe vs. Butterworth, 1 Ex. 425; Greaves vs. Legg, 11 Ex. 642; 2 Hurl. & Nor. 210. And if defendant, without such special instructions, had undertaken to insure these goods, he could not have held plaintiffs for the premium. Gilly vs. Berlin, 12 An. 123; Alliance Co. vs. Louisiana Co., 8 La. 11.

The opinion of the Court was delivered by

MANNING, J. The suit is for the value of fifteen hogsheads of sugar, alleged to be twelve hundred dollars, lost by the sinking of the Steamer Exchange in the Atchafalaya River on January 3, 1882. The defendant was the factor of the plaintiffs, who reside at Abbeville. Their business relations commenced in 1879.

The plaintiffs had never instructed the defendant to insure their shipments. No instructions whatever were given concerning this shipment, and no insurance was effected.

There were two routes, or rather three, from Abbeville to New Orleans. Two were all water routes, *i. e.*, by steamer up the Atchafalaya into the Mississippi; or down the Atchafalaya into the Gulf, and thence up the Mississippi. The third was by river and rail, *i. e.*, by steamer to Morgan City and thence by rail. The first two were disused after the Spring of 1881.

The practice of the defendant had been to insure the plaintiffs' shipments by the "all water" routes, and all the shipments prior to the Spring of 1881 had come by those routes. Seven accounts of sales from Dec. 15, 1879, to Feb. 24, 1881, contained charges of insurance at three-quarters per cent. The defendant had insured without instructions, and the plaintiffs had paid the charges for insurance without demur.

Then the mode of transportation was changed, because the "Exchange" plied thereafter only between Abbeville and Morgan, whence the goods came by rail to New Orleans, and the defendant's practice was not to insure produce coming to the city by rail unless expressly ordered.

If there were any consignments that afterwards came by river and rail, upon which no charges for insurance were made, and from which the plaintiffs might have learned that the practice of the defendant was different in the two modes of transportation, the record does not shew them. The defendant has not produced an account, whereon the insurance charges do not appear. The plaintiffs produce two to be noticed presently. But there was a shipment of rice April 6, 1881, probably the first by the river and rail route, and insurance is charged thereon precisely as in all the previous accounts on "all water" ship-

ments. The defendant's book-keeper says this is an error, but the plaintiffs were never so informed.

Two sales were made January 6, 1882, of shipments by river and rail, and no charge for insurance is upon the accounts, but the accounts were not rendered until three days after the Exchange had sunk, and of course were received by the plaintiffs later. So far from affecting them with notice of the defendant's practice not to effect insurance on shipments by that route, the date shews they were not apprised of it until after the disaster which occasioned the loss they are now seeking to recover of him. Indeed, these accounts of sales were sent under cover of the defendant's letter, in response to the plaintiffs' of date Jan. 3, 1882, informing him of the sinking of the steamer, in which he tells them the shipment was not insured, for the reason that no instructions to insure had been given, and adds: "Refer to account sales rendered you and you will see that I never charged you insurance when your goods were shipped by railroad."

The only account sales the plaintiffs had ever received, upon which there were no charges of insurance, were the two sent with that letter. Referring to all received before, they would have found insurance charged.

The defendant's practice was not to insure by separate policies for each shipment, but he had an open policy, and the shipments by "all water" routes were considered insured from the moment of their departure, although he was not, as he could not be, advised of them at that moment. These previous shipments by all water routes were therefore covered by this open policy, when neither he nor the insurance company knew they were *en route*. If a loss had occurred, it would have been reported to the company in the monthly statements made according to custom. If instructions had been given to insure this particular shipment, the mode would have been simply to include it in the next monthly statement after the loss had incurred. The defendant was too honorable to include it, when the commercial custom and his own was to consider such shipments not insured.

But the plaintiffs had every reason to believe that this shipment was insured without instructions, since every shipment they had ever made to him had been insured without instructions. Insurance had always been charged. The only instances where it had not been charged were unknown to the plaintiffs until reclamation was made for this loss. When the practice or custom of a factor is to insure consignments of produce and this is brought to the knowledge of his consignor by uniform charges for insurance on his accounts rendered, he will be deemed to have continued that custom until he gives notice to the consignor of

the change, and is responsible for any loss consequent upon his failure to insure before such notice reaches the consignor. Ralston vs. Barclay, 6 Mart. 649; Berthoud vs. Gordon, 6 La. 579; Strong vs. High, 2 Rob. 103; Story on Agency, 212.

The defendant insists that, even granting the correctness of this legal proposition, he is exonerated from responsibility because the usage of trade, and the mode of transacting this particular business, was not to insure on rail shipments, and he conformed to that usage, citing Story on Agency, § 199.

The custom is concisely stated by the defendant on the witness stand: "Everything is covered by insurance that comes by boat to the City, nothing by rail except it is expressly ordered. If it comes by boat, it is insured unless ordered not to be insured. If it comes by rail, the custom I think all over the country—I know it is with us—is not to insure unless expressly ordered."

This shipment did not come to the City by rail alone, but the first part of the voyage was by water and the last by rail. If the meaning is that no insurance was effected without special instructions whenever the mode of conveyance *into* the City was by rail, then the plaintiffs had the best reason to believe that the defendant's own usage was to insure their produce whether it came by river and rail, or by river all the way, because all the accounts that had been rendered them by the defendant, by the one route as well as the other, contained the charge for insurance.

Judgment affirmed.

On Application for Rehearing.

We have re-examined the facts of this case with every desire to relieve the defendant from an obligation which bears hardly upon him, in view of his perfect good faith and alleged conformance to a usage of trade. We understood before as now that his construction of that usage was, that produce reaching the City by rail was not insured without special instructions. This shipment, *quoad* the plaintiffs, was by boat as all their shipments had been, and all of them had been insured by the defendant without instructions save only this. They could not know he had, or intended to have, a different rule when the produce started by river and came in by rail, unless he had informed them by a change in his accounts—the omission of any charge for insurance whatever, or other manner. But there was no change in the accounts. The insurance charge on the rice was insignificant in amount, but significant in shewing the plaintiffs that insurance was

effected for them by this river and rail route precisely as it had been by the all river route, and even at the same rates.

What reason, asks the defendant in his brief for rehearing, had the plaintiffs to believe that his own usage was to insure their produce whether it came by river and rail, or by river all the way? The reason that he had invariably insured every shipment they had ever made to him, whether by the one route or the other, and every account they had received from him contained the charges for such insurance, until this loss occurred and demand for the insurance was made. Not until then was an account sent them without charges for insurance, with the letter that declined paying the demand, and stating the reason therefor.

Conceding that the plaintiffs were bound to know the usages of trade, it is equally true that the defendant was bound by his own usage uniformly followed with these plaintiffs.

The rehearing is refused.

No. 8938.

THE NEW ORLEANS COTTON EXCHANGE VS. THE BOARD OF ASSESSORS.

However clear may be the power, or even the duty, of the legislature to tax any particular species of property, the burden cannot be imposed until that power is exerted.

Act No. 77 of 1880 had in contemplation the assessment and taxing of shares in money making and dividend paying corporations. It was not designed to embrace corporations like the Cotton Exchange, which is not a money making and dividend paying corporation.

The Court will not pass upon the liability *vel non* to taxation and the regularity *vel non* of the listing of property, in the absence of a law actually providing for its taxation and assessment.

APPEAL from the Civil District Court for the Parish of Orleans. *Houston*, J.

Bayne & Denègre and *Miller & Finney* for Plaintiff and Appellant:

No tax can be imposed on the shares of stock of a corporation, unless over and above the property of the corporation, all of which is directly taxed; the shares have a taxable value.

This taxable value is illustrated by shares of banks, insurance companies and corporations organized to make profits for shareholders; over and above the property of such corporations taxed direct, such shares have a money or property value, *i. e.*, dividends or interest, on which the tax falls when such shares are taxed.

The mode of collecting the tax on shares, in itself, shows that only the shares of dividend or interest paying corporations was designed to be taxed; the tax is imposed on the shareholder—not the corporation—the corporation is required to pay for, and then collect the tax from the shareholder, and the law contemplates that from dividends or interest on the shares, the corporation will have in its hands, the fund out of which it can retain the tax; it follows, that the law prescribing this mode of collection, did not contemplate the taxation of shares of such corporation, as from their nature, can have in their hands no interest or dividends whatever. See Burroughs on Taxation, § 86, p. 170; 3d Wallace, p.

582; 9th Wallace, p. 359. See origin and application of this mode of collecting the tax in 13th U. S. Statutes at large, p. 277. Acts 1880, p. 102, S. 48.

The Cotton Exchange organized solely to establish the Exchange, not to make profits in any shape or form for shareholders, its shares drawing no dividends or interest whatever, have no such taxable value, as exists in the taxation of shares of corporations, which draw interest or dividends, and in so far as the Cotton Exchange share represents the fractional part of the property of the corporation, if ever divided, that element of value is included in the direct taxes paid by the corporation. See Cotton Exchange charter.

Hence, over and above the property of the corporation, the Cotton Exchange share has no value whatever, but that which arises from the right of access to the Cotton Exchange, its charter requiring each member to own one share of stock.

It follows that the value of the Cotton Exchange share proposed to be taxed in this case, is simply, and only, that derived from the privilege of admission to the Cotton Exchange, and that is not a taxable value, in any sense recognized in taxation; the tax is as unsupported as would be to tax the value of certificates of admission to the Exchange, its shares being, in effect, such certificates; or to tax shares of stock of a social club, church or other organization, representing and deriving all their value from the right, not taxable, of entering the rooms of the club or other organization.

Chas. F. Buck, City Attorney, and *Wynne Rogers* for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a proceeding to annul an assessment of stock, for the year 1882. From a judgment rejecting its demand, the plaintiff appeals.

The assessors have assessed for the year stated the plaintiff's real estate at $87,000, and its shareholders, five hundred shares, each of the value of $3,326, forming an aggregate of $1,663,000.

The questions presented are the following:

1. Are the shares *property*, in the sense that they are taxable?

2. Can they, if such property, be taxed under the Act of 1880, No. 77, which provides how shares in *corporations* shall be assessed and how the tax thereon shall be paid?

3. Have the shares been assessed, as provided by that Act, and is the corporation liable for the tax?

Differences of opinion may well exist as to the character of the shares in question and as to the power or impotence of the State to subject them to taxation; but no one will pretend that, unless the legislature has actually determined that they shall be assessed and has provided for the mode in which the assessment shall be made and the tax collected, a valid assessment of the same can be made, and a tax levied thereon can be legally claimed.

"The legislature," says, Cooley, p. 125, "must decide when and how and for what public purposes a tax shall be levied and must select the objects of taxation. This is legislative, and the legislative conclusion in the premises must be accepted as proper and final."

"No tax," says, Burroughs, § 91, p. 194, "can be levied, without the authority of the legislature of the State."

If it be true that the shares assessed are of such a nature that they are not *property*, in the sense that they are a value which can legally be taxed, then, the assessment of them, even if specially authorized by law, would be a nullity. If, on the other hand, they are *property*, which can be taxed and there exists no legislative sanction directing their assessment and providing for the mode of collection of the tax levied, the assessment complained of being unauthorized, must be annulled.

So that, from either standpoint, it is unnecessary to determine, whether the shares in question are, or not, *property* taxable under the theory of the present Constitution; particularly, as our conclusions do not tend to an affirmance of the judgment appealed from. Did we think otherwise, and then only, would it have been incumbent upon us to pass upon the nature and taxability *vel non* of the shares in question. This view of the case leads us, therefore, to the consideration and solution of the second question, which is:

II.

Can those shares be assessed and taxed, under the Act of 1880, No. 77, which provides how shares in corporations shall be assessed, and how the tax thereon shall be paid?

It is elementary, *as already stated*, that property, however taxable, that is, however *liable to taxation*, cannot be assessed and subjected to consequent taxes, unless the only authority which had a right to speak has been heard to thus command. In other words, property, in itself taxable, cannot be assessed and be made to contribute, by taxation, to government expenses, where the legislature has not directed its assessment and provided for the mode of collecting the taxes levied upon it.

In the Forman case, recently decided, (*ante* p. 825) we had occasion emphatically to recognize and announce, as a settled principle, that, however clear be the power, or even the duty, of the legislature to levy a tax on any particular species of property, until that power had been exerted, the burden could not be imposed. The legislative intent must be explicitly and distinctly shown and cannot be extended by implication beyond the clear import of the language used. Cooley on Tax. 201, 202; Dwarris on Statutes, 742, 749; 2d Story, U. S. vs. Wiggleworth, 369. Hence, we reached the conclusion, in that case, that, as there was no legislative enactment directing the assessment of a man's *income*, such income could not be assessed and payment of

the tax thereon enforced; and we allowed the plaintiff the relief he sought, O. B. 57, fol. 786.

This is so truly correct that the defendants, on plaintiff's challenge that the shares are not taxable, because not liable to assessment, point to the Act of 1880 as their authority for listing them.

That Act, Section 48, provides, that: "the actual shares shall be assessed to the shareholders, and that, 'all the taxes so assessed shall be paid by the corporation, which shall be entitled to collect the amounts from the shareholders or their transferrees.'"

The validity of such mode of assessment and of collection was attacked, but the Supreme Court of the United States has in two cases maintained the same, for the reason that the corporation was made to pay "out of the means of the stockholder under its control," and did so by withholding the assessment out of the dividends. 9 Wall. 362; 18 Wall. 230. An intelligent consideration of that section satisfies the legal mind, that it was designed to apply solely to money making corporations, declaring dividends or susceptible of declaring such, and in no way to the corporations, the object of which was not to make money, so as to declare profits or dividends on the shares held by their members.

An examination of the charter of the corporation, plaintiff herein, and of the testimony, establishes that it is not such a corporation, or organization, as the legislature intended to reach by the provisions of the Act quoted.

It is impossible to dissect the section, so as to say, that the first part of it, which refers to corporations generally, includes the plaintiff, and that the last portion of it, which provides for the payment of the tax on the shares, applies only to part of such corporations. The whole section contemplates one and the same class of corporations, money making and dividend paying corporations, and must be restricted to such only.

This conclusion is the more irresistible, as, at that time, the plaintiff, although it existed, was in a state of slumber, which did not reveal its existence, and surely was not in such prosperous condition, that the legislature could expect to draw by taxation any benefit from its existence.

It was not then a *going* corporation, and was barren of any good or advantage to its members. It was a nominal concern.

The Cotton Exchange is not a monied, or property corporation, representing property invested for gain. It pays no dividends, lends no money, transacts no business of its own, from which pecuniary profits result to itself, or to its members, It is, by the express law of its creation, an association, the purpose of which is "to provide and maintain

suitable rooms for a Cotton Exchange, in the City of New Orleans." It owns no property, except that represented by the real estate on which its Exchange building is constructed. The value of its shares is nominal, and depends entirely upon the privilege of membership. It has no means or revenue, out of which taxes on the shares can be paid, being supported only by voluntary contributions in the shape of annual dues from its *members*. Not being a monied corporation, it does not come within the purview of the invoked Act of 1880.

The mode which this Act provides for the payment of the tax by the corporations embraced within the section, is: "that the taxes so assessed (to the shareholders) shall be paid by the bank, company, firm, association or corporation, which shall be entitled to collect the amounts from the shareholders or their transferrees." It is destructive of defendants' theory.

The corporation is distinct from its stockholders, as concerns the ownership of property. If the corporation could be legally made liable for the debts of its stockholders, then, constitutionally, the property of one citizen could be legally subjected, independent of any contract, to the debts of another. This cannot be done.

The taxes on the shares would, in less than three years, surely within a few, amount to such figure and require such property for satisfaction, that the real estate and building with all its appurtenances owned by the corporation would soon be absorbed, and the whole organization destroyed and converted into less than nothingness. As was well observed by a French economist:

"Taxes levied by the sovereign on his people, should be like the light vapors which the Sun extracts from the Earth, to be returned to it, in fertilizing dews."

The object of taxation is preservation and not destruction and annihilation.

We therefore conclude, on this branch of the case, that it did not enter in the legislative mind to include corporations of the class, to which the plaintiff belongs, among those mentioned in the act invoked, and that the assessment made of the shares of the plaintiff corporation was, as charged, unauthorized, and is therefore illegal, null and void.

III.

This view of the case renders it unnecessary to pass upon the third question presented, namely: the validity of the assessment, as made, for it matters not how regularly the listing may have been effected, if the assessment be illegal, the listing must be so likewise, and necessarily share the same fate.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of plaintiff, annulling, to all ends and purposes and as prayed for, the assessment of shares mentioned in the petition, defendants to pay costs in both Courts.

CONCURRING OPINION.

FENNER, J. I find no necessity for, or propriety in, holding that the plaintiff corporation did not fall within the legislative *intent*, as expressed in the broad and unrestricted terms of Act No. 77 of 1880.

I fully concur, however, in the decree, upon the ground sufficiently indicated and enforced in the opinion, that, whatever the legislative *intent*, it did not lie within the legislative *power* to make a corporation of this character liable for taxes avowedly levied upon, and due by its stockholders alone and as independent persons.

No. 8961.

THE STATE OF LOUISIANA VS. ALFRED H. PORTER AND HENRY STOWE.

In criminal practice no rule compels the trial Judge to charge the jury in the identical terms and language suggested by counsel for the accused. A charge embodying substantially the principle invoked by the accused, and containing a correct exposition of the law regulating the point involved, is sufficient and will be maintained by the Supreme Court. The following charge was properly refused in a criminal trial, as being argumentative and involving nice distinction in metaphysics, which it is not the province of the court to expound to a jury:

"In cases of wanton cruelty, the presumption is always against the State, for no man is cruel without some interest, without some motive of fear or hate."

APPEAL from the Criminal District Court for the Parish of Orleans. *Luzenberg*, J.

J. C. Egan, Attorney General, for the State, Appellee.

F. D. Chrétien for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. Porter, one of the defendants herein, appeals from a conviction of manslaughter and a sentence of ten years' hard labor, and complains:

1. That the trial Judge erred in refusing to give to the jury at his request, the following charge:

"Proof of good character is good evidence, and is entitled to be considered with as much weight as any other evidence, on the trial of

the case. If, in consideration of the testimony, that of the peaceful and quiet disposition of the accused, taken in connection with the other evidence, creates a doubt in your mind as to his guilt, he is entitled to the benefit of the doubt, and if his good character be proved to the satisfaction of the jury, it should produce an acquittal, even in cases where the whole evidence slightly preponderates against the accused."

The Judge's ruling is explained and supported by the following very satisfactory reasons:

"The jury had already been instructed that good character, when proved, was a fact to be taken into consideration by the jury just like any other fact in the case. Indeed, that proof of good character was sometimes sufficient to create in the minds of the jury the reasonable doubt which operated the acquittal of the accused, and which, without such proof, could not possibly exist."

The difference, if any, between the charge given by the court and that suggested by counsel, is not very apparent to our minds, and we seriously doubt that the jury could discern the difference, and that such difference could have had the remotest influence on their finding. The slight shade of difference between the two charges is favorable to the construction adopted by the Judge of the law which regulates the point in controversy. The charge as given was amply liberal to the accused, and strips him of all right of complaint in this connection State vs. Garic, 35 An.

The trial Judge, who embodies in his charge the substantial meaning of an established principle of law invoked by the accused, and thus correctly expounds the accepted doctrine involved in the matter, has done his duty both to the State and to the accused. Nothing more can be required of him. No rule of law or of criminal jurisprudence can exact of a Judge the adoption of the very language suggested by counsel for the accused in a charge which the latter may seek from the court.

2. The defendant next urges error in the refusal of the following charge:

"In cases of wanton cruelty, the presumption is always against the State; for no man is cruel without some interest, without some motive of fear or hate."

The court correctly held that this utterance partakes more of the character of an argument than the declaration of an established rule of evidence. The duty of expounding the law to the jury does not impose on the Judge the painful task of submitting to their consideration a thesis on the subtleties of metaphysics. When the evidence proves

against the accused the commission of an act of wanton cruelty, the law and the jury have little concern with the motive which prompted the perpetration of the crime.

3. In his brief, and for the first time, counsel for the accused alleges an error apparent on the face of the record, which is alleged to show that, on the trial of an indictment for murder, the jury returned a verdict of guilty recommending the accused to the mercy of the court, which was followed by a sentence of ten years in the State Penitentiary. It is charged that the verdict is not responsive to the indictment and that the sentence is illegal. This complaint is not brought to our notice in any of the modes or forms prescribed by law or exacted by criminal jurisprudence. It is not supported by a motion in arrest of judgment, and is not embodied in an assignment of errors, and hence the matters urged therein cannot avail the accused in this Court. State vs. Arthur, 10 An. 265; State vs. Bass, 12 An. 862.

But, as this Court might of its own motion have noticed such a glaring inconsistency, if it existed as charged, we have examined the record and have ascertained that the complaint is absolutely groundless.

The record shows that, under an indictment for murder the accused had been tried for manslaughter, had been convicted thereof and sentenced thereunder to a term of ten years in the State Penitentiary. If the complaint of the accused had been substantiated by the record, he would have occupied the unprecedented attitude of a party complaining that he should have been hung instead of being condemned to hard labor for ten years. We find no error in the proceedings which could justify our interference in behalf of the appellant.

Judgment affirmed.

No. 8773.

LAFITTE, DUFILHO & CO. VS. LEON GODCHAUX.

An invalid contract by an agent will be held as ratified by the principal, after a tacit acquiescence and a long silence.

This rule applies to a sale of stock made by a pledgee, which, though invalid in itself, is confirmed by a settlement, under such sale, subsequently made between the pledgor and the pledgee.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe*, J.

J. L. Tissot and *W. S. Benedict* for Plaintiffs and Appellees.

T. J. Semmes & Payne and *T. Gilmore & Sons* for Defendant and Appellant:

1. A sale of stock made by pledgee, under the power given in the act of pledge, though invalid in itself, is confirmed by a settlement of the balance resulting from the sale, made between the pledgor and pledgee. 16 La. 51; 18 La. 517.
2. Where the pledgor, at the time of settlement, has the means of knowledge respecting the manner of making the sale, the possession of such means is equivalent to knowledge. 1 Dillon, 85; 11 Wall. 107; 101 U. S. 141.
3. The settlement or compromise is a bar to an action to attack such sale, until the compromise is rescinded by direct action for error or fraud. 105 U. S. 605; 16 An. 543.

The opinion of the Court was delivered by

POCHÉ, J. The following facts have given rise to this litigation:

On the 29th of June, 1873, the plaintiffs pledged to the defendant 235 shares of the capital stock of the New Orleans Insurance Company to secure the payment of their note of $9,000, dated June 29, 1873, and maturing one year after date, with interest of eight per cent. after maturity. By the act of pledge the right was given to the creditor to sell the pledged securities either at public or private sale, without judicial intervention, in case of non-payment of the note at maturity. After protesting the note, the defendant placed the stock in the hands of a broker for sale, and a few days thereafter he notified plaintiffs that the stock had been sold for $32.25 a share, realizing an aggregate of $7,578.75 to the credit of their note, and leaving a balance yet due him thereon of $1,449.25.

The par value of the stock was $50 a share. After several demands for the settlement of his balance, the defendant agreed to accept in full of the same, $1,014.47, one-half cash, and the balance in a note maturing February 23d, 1877, which was paid at maturity. This settlement took place on the 20th of November, 1875.

This suit was instituted on the 6th of May, 1882, and has for object the recovery of the 235 shares of stock originally pledged to defendant, on the ground that the said stock had not been sold on the 3d of July, 1874, as the defendant pretended, but that he had detained them, the pretended sale having been made to a person interposed, who had immediately returned the stock to the defendant. The suit was preceded by a tender of the amount of plaintiffs' note, originally held by defendant, with interest to date of the tender, less the amount of $1,014.47 previously paid to the defendant, as stated above.

The District Judge gave judgment in favor of plaintiffs, condemning the defendant to pay to them the difference between the amount of the note in capital and interest, and the amount realized by defendant on sales of the stock, which he afterwards had made of the same, and of

the dividends which he had received thereon, with legal interest on both, allowing to plaintiffs, as credit on their note, the sum of $1,449.25, amount claimed by defendant, as balance due on the note on July 3d, 1874, for which he had subsequently accepted $1,014.47. The judgment amounts in figures to $3,577.23, and defendant now seeks its reversal. Under the views which we have taken of the case, we concede that the party to whom the stock was sold on the 3d of July, 1874, was a person interposed who at once returned the shares to defendant, and was by him reimbursed the amount stipulated as the purchase price; that this step was taken to fix some price on stock, which is shown to have had no market value at the time, on account of the financial crisis which struck this country in the year 1873.

In other words, we shall treat that sale as not valid in law.

But, on the other hand, it is true that its nullity affected the plaintiffs only, and that its validity depended on their will alone.

One of the plaintiffs who was at the time and has been for sixteen years a director in the Insurance Company in question, and who therefore had every opportunity to know in whose name the stock stood on the books of the Company, and that no transfer of the same had been made to the ostensible purchaser of July 3d, 1874, testifies that he always believed and felt certain that there had been no genuine sale of the stock at the time; that there was then no market for the same, and that the defendant had continued to hold the said shares.

And yet, while under that belief, he accepts the return of the sale made to him by the defendant, and acknowledges an indebtedness to him, as a balance due after such sale, in the sum of $1,449.25, in settlement of which his firm agrees to pay and does pay the sum of $1,014,47.

In law, as well as in equity and justice, such conduct cannot escape the construction of a full ratification of the sale reported by their creditor, as made by him, under the authority of the pledge.

In such a transaction the relation of the pledgee to the pledgor is precisely that of an agent to his principal, and the validity of his acts must be tested under the same rules.

Those rules are well known and firmly established in our jurisprudence, and they hold the acquiesence or long silence of the principal touching an unauthorized or illegal act of his agent as a ratification of the act or contract of the agent.

The genius of our law does not favor the claims of those who have long slept on their rights, and who, after years of inertia, conveying an assurance of acquiesence in a given state of things, suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid

of the courts for relief, under the effect of a newly discovered technical error in some ancient transaction or settlement.

In the case of Bennett vs. Mechanics' and Traders' Bank, 34 An. 150, we had occasion to discuss this principle and to take an extended review of our jurisprudence on this question, and we therein enforced this rule as a bar to recovery on a similarly stale demand. Among the numerous authorities which we had occasion to examine, we find two decisions of our Court which are quite in point in this case. Dupré vs. Splane, 16 La. 51; Starr vs. Zacharie, 18 La. 517.

We are very clear and positive in our belief, that if the stock in question had not greatly increased in value, since the date of the transactions which plaintiffs now seek to disturb and annul, this suit would never have found its way to the temple of justice, and that a demand, based on the subsequent depreciation of the same, would have been strenuously resisted by plaintiffs.

The impression made on our minds by the evidence, as well as all the equities in this case, compels us to differ with our learned brother of the District Court.

The judgment appealed from is, therefore, annulled, avoided and reversed, and it is ordered that plaintiffs' demand be rejected and their action dismissed at their costs in both Courts.

Rehearing refused.

No. 8940.

E. W. TROEGEL VS. THE JUDGE OF THE SECOND CITY COURT ET AL.

It is only where the inferior Judge exceeds the bounds of his jurisdiction, or is guilty of an usurpation or abuse of his authority, that this Court, under the rules heretofore propounded, will interpose its supervisory powers.

So, where a person is sued personally for an amount within the jurisdiction of the court and seeks to avoid a personal liability, by pleading that the act or omission complained of, if done at all, was in his capacity of syndic of an insolvent estate then being administered in the District Court, which court it is averred has sole jurisdiction of the demand, and the plea is overruled and judgment rendered against the defendant personally, this Court will not interfere.

The plea in avoidance and its legal effect, was a proper matter for the determination of the Judge.

APPLICATION for Writs of Certiorari and Prohibition.

A. Bernau for the Relator.

H. H. Bryan, Jr. for the Respondents.

The opinion of the Court was delivered by

TODD, J. The plaintiff, or relator, applies for writs of *certiorari* and prohibition under the following circumstances:

Joseph Hirn, one of the respondents herein, had brought suit against Troegel for less than one hundred dollars before the Judge of the Second City Court of New Orleans, and obtained judgment against him for the amount of his demand.

The claim sued on was for damages based upon an averment that, through the carelessness of Troegel, in leaving open the entrances to a building of which he had the possession, thieves had entered the shop of Hirn, the respondent, and robbed him of articles of value to the amount demanded in the suit, charging that Troegel was liable for the same because, through his fault, the loss had occurred.

Troegel's main defense to the suit, as we gather from the record, was that his possession of the building in question was a mere constructive possession, as syndic of a certain insolvent estate to which the property belonged, which estate was then under administration in the Civil District Court, and that, therefore, the Second City Court, before which the proceeding was pending, was without jurisdiction.

This defense was overruled, and judgment rendered for the amount claimed.

The relator complains of the proceedings and seeks to have the judgment declared a nullity, on the ground that the court was without jurisdiction to try the case.

The claim was a demand brought by Hirn against Troegel personally. The latter attempted to evade personal liability by pleading that the acts of negligence charged were committed, if at all, in his capacity of syndic of the insolvent estate, and that the question of negligence *vel non* was a matter exclusively for the determination of this court before which the insolvent proceedings were pending.

The City Court had to pass:

1. On the fact of Troegel's alleged possession as syndic; and

2. If this was shown to be the character of his possession, then upon the question whether, such being his possession, it relieved him of personal responsibility, and deprived the court of jurisdiction; or,

3. The Judge might have concluded that the exception or plea was wholly irrelevant, and could, in no way, affect the question of the relator's personal liability.

Whatever may have been his conclusion on these points, and whether his conclusion was one of fact or of law, it is very certain that the whole matter was within the scope of his jurisdiction.

If evidence was offered touching the insolvency proceedings before

another court and rejected, the ruling could not necessarily be regarded as arbitrary, for it is well settled, that though a person may be an agent or acting in a representative capacity, he may, nevertheless, under certain exceptional conditions, render himself personally responsible to third persons; and such may have the case in this instance.

At any rate, it was a matter that the respondent Judge had a right to determine, and having such right and authority, even if his decision was wrong, under the rules we have laid down for the exercise of the supervisory power conferred on this Court, it would not be a case for our interference. State ex rel. vs. Skinner, Judge, 33 An. 255. As we have repeatedly said, it must be a case of a Judge exceeding the bounds of his jurisdiction, or guilty of arbitrarily ruling, and usurpation or abuse of authority, that this Court will feel authorized to interfere.

We discover nothing of the kind in the proceedings before us.

It is, therefore, ordered that the restraining order heretofore issued be rescinded, and that the writs applied for refused at the cost of the relator.

Rehearing refused.

No. 8744.

CHRISTOPHER SATTERLY VS. CHARLES MORGAN.

In absence of proof of fault or negligence in the employment of incompetent or careless servants, an employer is not responsible for damages resulting to one servant from the fault or negligence of another. Upon the facts and circumstances disclosed by the evidence, plaintiff's claim for damages cannot be sustained.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

W. S. Benedict and *Jos. P. Hornor* for Plaintiff and Appellee.

Leovy & Kruttschnitt for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Plaintiff was employed as a "yard-switchman" on defendant's railroad, engaged in aiding in running into the yard empty cars, and sending out loaded ones.

One of the operations employed by the defendant in the movement of loaded cars, for a short distance in the yard, was the following: an engine on an adjoining track parallel to the one on which the freight cars were, would be attached to the latter by means of a switch-rope with hooks at either end, one of which was attached to the engine, and the other to the leading car. The process was for the engine to move

forward a certain distance, until a certain momentum had been given to the cars, then to slack and let the cars proceed by their own *vis inertiæ*. A switchman was employed to detach the connecting rope from the car at the proper moment. Between the parallel tracks, at a point beyond that at which the rope was ordinarily to be detached, were some pilings or posts, placed there for legitimate purposes of defendant's business, and which had long been there to the knowlege of plaintiff.

On the occasion in question, while plaintiff was acting as switchman, owing either to his own fault or to that of the engineer handling the engine, the rope was not detached prior to reaching the obstruction, plaintiff tried, but failed, to lift the rope over, which fouled with the pilings, he then ran to the car and made an ineffectual effort to detach the rope; the piling gave way under the strain, the rope recoiled striking him and knocking him under the cars, where he was seriously injured.

The present action sounds in damages for said injury.

1. Plaintiff claims that defendant was in fault for having the pilings where they were. The evidence shows that they had long been there; that they were put there for a useful purpose; that they had never before occasioned injury; that plaintiff knew of their presence and assumed any risk incident thereto.

2. He complains that the accident resulted from the negligence and fault of defendant's engineer. If that were true, it would not avail, in absence of any proof of fault, or negligence, of defendant in his employment or retention. The engineer's character as a skilful, experienced and generally careful servant, is fully established. Under such circumstances, the employer cannot be held responsible; Hubgh vs. Carrollton, 6 An. 495; Poirier vs. Carroll, 35 An.; 2 Thompson Neg. 969, 987; Wood, Master and Servant, Sec. 416.

3. The alleged deficiency in the lights provided by defendant is not supported by the evidence; nor is it apparent how that contributed in any manner to the accident.

4. It does appear that plaintiff chose to perform the duty assigned him in an unusual and perilous manner, persisting in his course against warning, and that, if he had pursued the course usually adopted, and of which he was notified, he would not have been injured.

5. Finally, in order to secure a continuance of his salary, plaintiff himself wrote a letter to defendant's superintendent, in which he stated: "I have not and never had the least idea to enter suit against Mr. Morgan. I feel positive it was an unavoidable accident." Upon

the faith of this he received his salary during the whole time of his confinement and was subsequently continued in defendant's employ, until nearly a year after the accident, when, having been discharged for other reasons, he brought the present action.

The case is absolutely without merit, and the verdict of fifteen hundred dollars damages does not redound to the credit of trial by jury in such cases.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from be annulled, avoided and reversed, and that there be judgment rejecting plaintiff's demand, at his costs in both Courts.

No. 8868.

THE STATE OF LOUISIANA VS. J. R. A. GAUTHREAUX ET AL.

In an action by the State against a defaulting sheriff and his sureties for public monies, collected and not accounted for, an averment that the monies collected belong to a particular class and were received within a stated period, will be deemed sufficient. The State cannot be required to allege matters of details not within her knowledge. It would be exacting an impossibility. Exceptions to the vagueness of the demand are properly overruled.

Where objections to trial are based on alleged irregularities in ordering, making and submitting a report of experts, and there is no occasion to complain of the mode in which the same was made and returned, and where testimony show the report to be correct, the ruling of the court will not be disturbed.

Sureties, who have already made payment on account of the sums for which they have subscribed a sheriff's bond, are entitled to credit, and can be held for the difference only.

A rule, taken by experts to have their fees taxed, should have been served on all the parties to the suit. Service on the plaintiff alone is insufficient. The judgment making such rule absolute, although repeated in the judgment on the merits, will prove of no effect.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

J. C. Egan, Attorney General, for Plaintiff and Appellee.

W. S. Benedict for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action against a defaulting sheriff and his sureties for public monies collected and not accounted for.

From a judgment adverse to them, two sureties (Fazende and Seixas) have appealed.

They complain that their exceptions to the vagueness of the petition were improperly overruled.

The petition charges substantially: that the amount claimed was

collected in 1879 and 1880, and was not paid over to the State, and that the exact amount is not known to the State.

Such was, no doubt, the fact. How could the State then have specified every item of a claim alleged far to have exceeded one hundred and fifty thousand dollars?

The rule invoked by the appellants is a sound one; but it is not such as can be invariably enforced in all cases. Indeed, the law drives no one to an impossibility.

The exception was properly overruled.

On the day of trial, the State offered in evidence a report of experts showing the ascertained amount of delinquency to be $76,396.

The appellants objected to trial on several grounds:

1. That they were not notified by the experts of the time and place of their proceedings;

2. That no rule was taken to homologate;

3. The report was not submitted and produced in court, as the law requires;

4. The defendants had no opportunity of examining the report;

5. The report was recommitted to the experts without notice to defendants, and the new report is subject to the same objections as the original one;

6. The supplemental report is not made in conformity with the order of the court, and being produced for the first time, no opportunity has been presented for its examination.

It might be enough, in order to answer those objections, merely to say: that notice is to be given only where either party requests it; that a rule to homologate was no more necessary than is *required* where testimony taken under commission is returned into court, the law leaving the course to be pursued at the option of the party; that the filing of the report is a sufficient production and submission of it; that the defendants, if they thought the report defective and were taken by surprise, could have applied for time; that the Judge had authority to refer the matter back of his own motion, and that the objections to the supplementary report, being identical with those to the original one, are not better founded.

Had the court sustained the objections, it would have been, no doubt, for the purpose of enabling the defendants to show error in the finding of the experts, and thus affording them relief.

But what importance can be here attached to those objections, when the appellants, in their printed brief, admit the correctness of the report? That brief contains the following passage:

"No dispute arises in the case as to whether or not the amount found by the experts to be due by Gauthreaux, Sheriff, to the State, is or not correct.

"It may be assumed as correct, for the purpose of this argument.

"Nor are the figures found by the court in relation to the various sureties.

"There are two questions presented:

"*First.* Has plaintiff made out a case by his offer of the bond and the report of the experts?

"*Second.* Can the sureties be mulcted in costs taxed in favor of the experts?"

The court having overruled the objections to the going to trial, the case proceeded. The report was introduced, and also the testimony of a witness who had acted as one of the experts was heard. The defense offered no counter testimony.

The report and the testimony prove the amount for which the sheriff was found to be a defaulter to be that for which judgment was rendered, viz: $76,396.

It is evident that the object of the contention was not to go into the trial of the case; but that it ceased, practically, the moment the objections were overruled. It is not here disputed that the court otherwise decided correctly. Why should we then critically examine the report and the testimony? It is enough, it seems to us, that both the report and the testimony justify the judgment.

The appellants pleaded in the lower court, that they had already satisfied their obligations as sureties, under their bond, up to the full amount of subscription. They have shown payment in part only, and were allowed credit therefor. The State has asked no amendment of the judgment, and the appellants admit its correctness in that particular.

The next complaint is as to the fees allowed the experts.

The amount at which their services were valued was fixed, on a rule by them, on the State only.

The rule should have been taken and determined contradictorily with each and every party to the suit.

The allowance of the same fees in the last part of the judgment does not cure the nullity, in the absence of any averment and proof that the question of the value of those services was at issue and considered on the trial of the case on its merits.

It is, therefore, ordered and decreed that so much of the judgment of the lower court as allows fees to the experts, as well as the decree making absolute the rule for the same, be reversed and set aside; and

It is further ordered and decreed that, as thus amended, the judgment appealed from be affirmed, appellants to pay costs of the lower court, and appellee those of the appeal.

Fenner, J., takes no part.

Rehearing refused.

No. 8698.

ALEXIS RIBET, AGENT, VS. JACQUES BATAILLE ET AL.

A pledge of bonds, stocks, notes, etc., made by delivery of them is valid, as well against third persons as against the pledgor, if made in good faith.

Simulation of ownership of bonds and stocks may be shewn by parol proof, as between the parties to the simulation.

Third parties, who have dealt with the apparent owner, cannot be prejudiced by the revelation of the real ownership, if they have acted in good faith.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

Breaux & Hall for Plaintiff and Appellant.

F. D. Chrétien for Defendants and Appellees.

Albert Voorhies on the same side.

A. J. Lewis on the same side.

The opinion of the Court was delivered by

MANNING, J. The suit is by Ribet, as agent for Leon Bataille, claiming of his brother Jacques, certain bonds, stocks, the dividends collected upon them, and insurance money for property burnt, all of which were placed in the defendant's hands or came into his possession by virtue of a power of attorney from Leon to Jacques, entrusting him with the management of his business. The prayer is that Leon be recognised as the owner of the bonds and stocks, and that Jacques be ordered to deliver them or pay their value, alleged to be fourteen hundred and ten dollars, and also account for the dividends and insurance, etc., charged to amount to $3,195.

The bonds and stocks were in the possession of Pierre Foch, who is made co-defendant, and the prayer for the delivery of them and the payment of dividends is made against him also.

The procuration to Jacques Bataille was given in July, 1873, in New Orleans, and Leon left here immediately thereafter. He had come from France to San Francisco in February, 1870, and there remained until October, 1872, when he came to New Orleans. He claims to have

made the money in California which was invested in the bonds and stocks, but his business there, his earnings and mode of life have been subjected to searching scrutiny, and it is manifest that he did not and could not have made, over and above needful expenses for the most frugal living, the sum stated by him as having been brought to New Orleans. Several witnesses detail circumstances, and Leon's own statements accord with them, which put his impecuniosity, at the time of his arrival here and during his stay, beyond any doubt.

The whole of this property in fact belonged to Jacques. Either from some apprehended business trouble, or an innate love of tortuous ways, he had placed it in Leon's name, and then took from Leon a power of attorney to manage it, and he did manage it. He seems to be a thriving person with some business capacity. Leon never got along except when some one was giving him a regular salary. As between these two brothers, that is the state of the case, as they both know full well.

But the plaintiff says the defendant is estopped from denying the plaintiff's title by his own repeated solemn asseverations. Certainly they are numerous enough. Jacques received from Leon a power of attorney to manage this business as Leon's, thereby acknowledging the bonds, stocks, etc., belonged to Leon. He once brought suit as agent of Leon to recover damages of Ribet for detention of these identical bonds and stocks, Ribet claiming to detain them as Jacques' property, and Jacques vehemently denying that he owned them, and asserting that they were the property of Leon. In another suit of Ribet against him, he answered that these bonds, etc., belonged to his brother and sequestered them as his brother's agent, of course, swearing to these facts. When he collected the insurance on a stock of groceries which had been burnt, he swore again they were Leon's goods. The false swearing is repeated unblushingly whenever occasion required, and the false pretence of another's ownership is kept up, until Leon determined that turpitude should not be confined to one member of the family, and brought this suit to take advantage of the confidence his brother reposed in him, and reap reward from abusing it. Seven years had passed in which Leon had never called on his brother to account for the receipts from his business. His letters (for he had gone back to France) contain expressions of gratitude to his brother for kindness while here, and each writes the other with a fraternal warmth of feeling that would be charming anywhere else than in juxtaposition to the charges and counter-charges in these pleadings. But there is not a word of this business. No inquiry how it is prospering, none about the dividends, whether paid or not, no call for remittances, no complaint of non-receipt of them, no acknowledgment

of any received. These seven years are a blank, a silence unbroken until Leon instituted this suit. So far as these two are concerned, we may repeat here the adjuration of the priestess to the intruder into the sacred grove, quoted years ago by the Great Chief Justice of this Court on a similar occasion:

"Procul, O! procul este profani,
* * * totoque absistite luco."

If third parties had dealt with these two on the faith of the apparent ownership created by their joint acts and representations, they could not be prejudiced by the revelation of the true ownership now for the first time disclosed. But the only third party interested is Foch, and his claim is based on the fact of ownership by the defendant Jacques Bataille.

Foch lent a thousand and thirty-one dollars to him, and received in pledge the bonds and stocks. The bonds were transferred to him on the books of the company, and the certificate of shares of stock were delivered to him. The shares were in the name of Jacques on the books. The bonds are negotiable instruments, payable to bearer, and transferable by delivery. No further formality was necessary. Rev. Civ. Code, Art. 3158; Smith vs. Crescent City Co., 30 Ann. 1378; Factors Ins. Co. vs. Marine Dry Dock, 31 Ann. 149; Pitot vs. Johnson, 33 Ann. 1286.

There is no question of Foch's good faith, none of the reality of the pledge. He was ignorant of the complications produced by the acts and declarations of the brothers, and is not affected by them. No dispute had then arisen between them. Leon's assertion of ownership had not then been made. Besides, even if the plaintiff were the real owner of the bonds and stocks, he had enabled his brother to make the transfer and deceive an innocent party who was ignorant of his pretended claim, and could not by any diligence have known of it. Giovanovich vs. Citizens' Bank, 26 Ann. 15.

Objection was made to the defendants' introduction of parol proof to establish the true ownership of the bonds and stock, which was properly overruled. The exclusion of testimony to that effect would have enabled the plaintiff to reap the fruits of iniquity through the instrumentality of a court of justice. The proof could affect no one but the parties to the contrivance designed by both to simulate ownership.

The judgment below was in favor of the defendants. It is affirmed with costs.

No. 8970.

THE STATE EX REL. W. H. AYMAR VS. THE JUDGE OF THE TWENTY-SECOND JUDICIAL DISTRICT COURT ET AL.

In an injunction suit to restrain a tax collector from proceeding with advertisement and sale of property for taxes, when judgment is rendered dissolving the injunction and ordering the tax collector to proceed with the sale to satisfy the taxes and naming the amount thereof, this last portion of the decree is not to be treated as a *moneyed judgment*, in estimating the amount of bond required for suspensive appeal.

APPLICATION for Writs of Mandamus and Prohibition.

R. G. Dugué and *Blanc & Butler* for the Relator.

F. B. Earhart, District Attorney, and *Simms & Poché* for the Respondents.

The opinion of the Court was delivered by

FENNER, J. The tax collector of the Parish of St. James had seized and advertised for sale a plantation belonging to relator, to satisfy State and Parish taxes for 1875 and 1876, with fees, costs and interest.

Relator, averring certain illegalities in the assessment and description of the property, applied to the District Court for, and obtained an injunction, on a bond for two hundred and fifty dollars, restraining the tax collector from proceeding with the sale. After issue joined and trial had, final judgment was rendered, dissolving the injunction, ordering the sheriff to proceed and sell the property, to satisfy the identical taxes for which he was originally proceeding when enjoined, condemning the relator and surety on his injunction bond to pay five per cent. attorneys' fees, and relator alone to pay costs of the proceedings.

Relator made seasonable application for a suspensive appeal, and contends that he was entitled to the same, upon giving bond in an amount exceeding, by one-half, the attorneys' fees and costs which he was condemned to pay. The Judge, however, refused to grant a suspensive appeal, save upon a bond for one-half over and above the amount of the entire taxes, fees, costs and interest.

Hence, these applications.

Relator was clearly entitled to his appeal upon a bond exceeding, by one-half, the amount of fees and costs. No other moneyed judgment was rendered against him. That portion of the decree which, after dissolving the injunction, orders the tax collector to proceed with the sale to satisfy the taxes, through naming the amount thereof, is not a *moneyed judgment*, and, indeed, strikes us as pure surplusage, since such proceeding was the natural consequence of the dissolution

of the injunction. The only question involved in the case was, whether the tax collector should be allowed to proceed with the sale or not. If it had been decreed that the injunction should be made perpetual and the tax collector restrained from proceeding, *that* would not have been a *moneyed judgment.* Neither is the decree, actually rendered, dissolving the injunction and ordering the tax collector to proceed, a moneyed judgment.

The case is fully covered by the authorities cited by relator. 21 An. 152; 29 An. 793; 30 An. 315; 34 An. 1211.

It is, therefore, ordered that the writs of mandamus and prohibition herein issued be made peremptory.

No. 8874.

HIBERNIA INSURANCE COMPANY OF NEW ORLEANS VS. FREDERICK A. BLANKS.

In a contract of insurance, the insurer has the right to cancel the policy for non-payment of the premium, and is entitled to recover premiums earned during the time that he carried the risk.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

T. Gilmore & Sons for Plaintiff and Appellee.

Singleton & Browne for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The object of this suit, is to recover the sum of $2924.44, for insurance premiums on a policy on the Steamer "F. A. Blanks," the additional sum of $37.50, for insurance on the Steamer "Tom Parker," and the further sum of $102.03, amount of a promissory note executed by the defendant.

The defence is a general denial, save of the signature to the promissory note, which is admitted, with the denial of any liability therefor.

The judgment below is in favor of plaintiff for the amount of premiums on the insurance of the "Blanks," and for the amount of the promissory note.

Defendant appeals and plaintiff moves for an amendment, so as to cover the amount of premium for the insurance on the "Tom Parker."

The record shows that on the application of J. W. Blanks for F. A. Blanks, the Insurance Company issued a policy on the 20th of December, 1881, for one year, insuring the Steamer F. A. Blanks, for naviga-

tion of the Mississippi and Ohio Rivers, up to forty thousand dollars, at a premium of ten per cent. or four thousand dollars, and for navigation on the Ouachita River for consideration of an additional premium of $1600.

It further appears that on the 28th of June, following, the Company cancelled the policy for non-payment of the premium, and notified the insured of said cancellation. The sum claimed is for the balance of the whole premium of $5,600, after giving credit to the insured for $2,675.56 amount of the unearned premiums.

1. The first point made by appellant is the failure of plaintiff to prove the authority of J. W. Blanks to effect the insurance.

The evidence shows that J. W. Blanks and his brother, the insured, were alternately the masters of the insured vessel, and the whole record teems with evidence, showing that F. A. Blanks fully and unreservedly ratified the contract made in his name by his brother. This ratification is clearly established by his personal application to the Company, under the very policy now repudiated by him, for leave to charter the insured vessel to Capt. T. P. Leathers, to be run in the Vicksburg trade.

This act is in itself an illustration of an unqualified ratification of an agent's contract made in the name of his principal.

2. Defendant next contends that, on its face, the policy shows that the premiums have been paid.

The following statement in the policy is the circumstance relied on by defendant for his bold and extraordinary pretension: "And the Insurance Company aforesaid do hereby bind the capital stock, and other common property of said Insurance Company to the assured, his heirs, executors, administrators and assigns, for the true performance of the promises, having received the consideration for this insurance at the rate of ten per cent. net."

We hardly know whether we should treat this point as a serious defence. It is evidently an afterthought, and we feel confident that it was not urged in the lower court.

We are loth to do the injustice to defendant's distinguished counsel to believe that he would have filed a general denial, instead of the plea of payment to a claim of nearly three thousand dollars, which had already been paid by his client.

We find him in the record propounding the following question to a witness for plaintiff: *Under that policy, when was the premium due?*

And in answer to the question, the witness informs us that it was due in six months. Hence, defendant himself offers a clear explanation of the true meaning of the words hereinabove quoted from the policy.

They mean that the consideration received was the promise of the insured to pay the premiums in six months.

The defence is therefore absolutely untenable.

The record contains no evidence on defendant's plea of want of consideration of the note sued upon.

Hence, that defence also fails.

We find sufficient evidence to sustain the claim for insurance on the "Tom Parker," and the judgment must be amended accordingly.

It is, therefore, ordered and decreed that the judgment appealed from be amended so as to increase it to the sum of three thousand and sixty-three 97-100 dollars, and that, as thus amended, said judgment be affirmed at appellant's costs in both Courts.

No. 8784.

CITY OF NEW ORLEANS vs. L'HOTE & CO.

Where a tax was duly levied on a factory for the manufacture of articles of wood by the City of New Orleans, and included in the City budget for 1879, collectible in 1880, an exemption therefor cannot be claimed under Article 207 of the present Constitution, subsequently adopted. That Article had no retroactive effect. The case comes within the scope of the decisions of City vs. Vergnole and Succession of Dupuy, 33 An. 39 and 258.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe*, J.

J. Ward Gurley, Jr. for Plaintiff and Appellee.

Chas. S. Rice for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. The defendants are appellants from a judgment condemning them to pay a tax on property described as a factory for the manufacture or making of articles of wood.

It is claimed that the property or factory is exempt from taxation, under Article 207 of the present State Constitution, and this presents the only question for determination, other issues raised by the pleadings having been abandoned.

The tax in question was levied prior to the adoption of the present State Constitution, being the tax assessed in 1879, to be collected in 1880. When this levy was made the property in question was clearly subject to taxation, there being then in existence no provision for its exemption, constitutional or legal.

In the cases of the City vs. Vergnole, 33 An. 36, and Suc. of Dupuy, 33 An. 258, we held, after mature deliberation, that the restrictions and limitations, respecting taxes and licenses, which would include also exemptions, established by the Constitution of 1879, had no retroactive effect.

The instant case comes clearly within the scope of those decisions, and the reasons therein given for the conclusions announced are equally applicable to the case before us.

Judgment affirmed.

No. 8867.

SUCCESSIONS OF P. C. CLAIRTEAUX AND U. CLAIRTEAUX.

Appeals will be dismissed where one bond only was furnished, under motions and orders of appeal from two judgments in two distinct and separate matters.

Widows in necessitous circumstances, who remain in possession of a small farm, in insolvent successions, which was exposed to be sold at any moment, to pay debts and to keep which a keeper would, otherwise, have to be employed, will not be charged for the value of the occupancy.

Where the residue in such successions is insufficient to pay both the privileges and the homestead, the court will abstain from passing critically on the merits of subsequent claims, to which nothing, in any event, could accrue.

APPEAL from the Twenty-sixth District Court, Parish of Jefferson. *Hahn*, J.

Jos. Brewer for Opponents and Appellants.

Jos. H. Spearing and *A. E. Billings* for Opponents and Appellants.

C. W. Besançon for the Administratrix.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. C. A. Philippi & Co., Ferdinand Samuel and Jules Samuel, appeal from judgments dismissing the oppositions which they have respectively filed to the accounts rendered in these two successions.

The administratrices move that the appeal taken by the Samuels be dismissed, among other reasons, because, there being two judgments, there should have been two motions and orders of appeal and two

bonds, one in each case, as there were two suits in each succession, and one bond only was furnished.

The oppositions were not consolidated below, to be tried together and determined by one and the same judgment. The order of consolidation was made after judgment. There were two judgments rendered, and two appeals taken. There should have been two bonds given.

The appeals of F. and J. Samuel are dismissed

ON THE MERITS OF THE OTHER OPPOSITION.

C. A. Philippi & Co. claim to be placed on the account in each succession for balance due them as advances made for the working of a small farm, owned in common by the Brothers Clairteaux, and the reimbursement of which was secured by mortgage on the land. They also claim that the amount allowed by each account to the widow of each of the brothers, as a homestead, should be stricken therefrom, or, at least, credited with the value of the occupancy and enjoyment of the property from the time of death to the date of sale.

The inventory shows that the piece of real estate owned by the two brothers was appraised, as a whole, at $1,500. It, however, sold for $2,500; some movable effects realized in one of the successions the sum of $221.

The account presented by the administratrix of the Succession of Ursin Clairteaux shows assets for $1,471.65, privileged liabilities for $595.32, and strikes a balance of $876, which it allows to the widow as in necessitous circumstances.

The other account, in the succession of P. C. Clairteaux, amounts, as assets, to the sum of $1,250, against which privileges for $370 are charged, leaving a balance of $879, which is allowed to the widow as her homestead.

The penurious circumstances of the widows is established. Nothing shows that the occupancy of this small property was worth more than what it would have cost to pay a keeper to take care of it. Had it been vacated, it would have remained either abandoned and exposed to ruin and devastation, or put in charge of a keeper, whom it would have been necessary to pay.

It is not shown that it could have been rented for anything. Indeed, how could it have been rented, belonging, as it did, to a thoroughly insolvent estate, and exposed at any time to be sold for the payment of the debts.

As the claims for a homestead absorb completely the residue of the assets, and rank, without doubt, Philippi & Co., who are not vendors,

but who only claim to be ordinary mortgage creditors, it is needless to review critically the judgment of the lower court, as nothing can actually accrue to these opponents.

An examination of the evidence and a consideration of the law do not enable us to say that the lower court erred.

The judgment is affirmed with costs.

Rehearing refused.

No. 8949.

THE STATE OF LOUISIANA VS. F. HARTLEB.

A trial Judge is justified in refusing to give to the jury special charges which, although legal and pertinent, are amply covered by charges previously given.

It is unnecessary, in an indictment under Sec. 832, R. S., charging in the words of the Statute, that the accused has feloniously received the object which had been feloniously stolen, he well knowing that the same had been so feloniously stolen and taken, to charge specially that the offence was committed with intent to defraud the owner of the property, or some person, or for the purpose of felonious or wicked gain.

APPEAL from the Criminal District Court for the Parish of Orleans. *Roman*, J.

J. C. Egan, Attorney General, for the State, Appellee.

R. S. Dennee and *Wm. R. Whitaker* for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from the verdict and judgment on an information for receiving stolen property. He was sentenced to hard labor, for one year, in the State penitentiary.

The record contains a bill of exception, a motion in arrest of judgment, which was overruled, and a bill taken to the action of the court thereon.

I.

The first bill is to the refusal of the Judge to give certain charges to the jury, which it is unnecessary to repeat.

The District Judge declares that: "though the charges were good law, he had already, and repeatedly, charged the jury on the matters contained in the special charges requested, and that it was unnecessary to refer again to them."

The refusal is sufficiently justified.

We have several times held, that the trial Judge is not bound to give to the jury charges requested, however legal or pertinent they may be, where they are covered by charges previously given.

II.

The motion in arrest is to the effect, that the information does not charge that the defendant received the diamond pin therein mentioned, with felonious intent, to defraud the true owner thereof, or any person, or that the defendant feloniously received said pin for the sake of felonious or wicked gain.

Section 832 R. S. provides: "Whoever shall receive, or buy any goods, or chattels that shall be feloniously taken or stolen from any other person, knowing the same to have been stolen, * * * shall restore the goods so received, or pay double the value thereof, and moreover suffer imprisonment at hard labor, not exceeding one year, and in default of making the restoration or payment aforesaid, shall suffer further imprisonment at hard labor for a period not exceeding one year."

The information charges that F. Hartleb, the defendant, feloniously did receive and have in his possession, one diamond cluster pin, of the value of $500, of the goods, chattels and property of one A. K. Brown, which had before then been feloniously stolen and taken from said A. K. Brown; he, the said F. Hartleb, then and there well knowing the said diamond cluster pin to have been so feloniously stolen and taken, contrary, etc., etc.

In the case of Moultrie, 34 An. 490, this Court said that: "criminal intent is of course of the essence of the crime, but the statute makes no formal requirements as to the mode of expressing the same. We think it is sufficiently expressed here by the charge, that it did feloniously receive and convert to his own use the property." See also State vs. Wolff, 34 An. 1153.

The defendant, in the present case, is distinctly charged, in conformity with the statute, with having feloniously received the diamond cluster pin, which had been feloniously stolen, he well knowing that the said pin had been feloniously stolen and taken.

It was unnecessary specially to charge that the offence was committed with intent to defraud the owner of the property or some person, or for the purpose of wicked gain.

The bill of exception taken to the ruling of the court on the motion in arrest, being on the same matter, has the same fate.

Judgment affirmed.

No. 8866.

JOHN H. WILBERDING VS. WIDOW DANIEL MAHER.

In an action for the specific performance of an agreement to sell for cash a piece of immovable property, if it is shown that the defendant, who is a widow, had purchased the property in her own name during marriage, under the *régime* of the community, and had in good faith believed it to be her separate property, but discovered, after her agreement to sell the same, that the property belonged to the community, and that her husband's share of the same, which had accrued to her as his universal legatee, was affected with a general mortgage, resulting from a bond of tutorship, and if it appears that it is impossible for her to cancel said mortgage, there is a lawful excuse for the non-performance of her contract, as the same had been made by her through an error of law. The defendant is therefore released from the obligation of her contract.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

A. J. Murphy and *W. S. Benedict* for Plaintiff and Appellee.

Jos. P. Hornor and *F. W. Baker* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff seeks to enforce the specific performance of a contract evidenced by the following instrument:

"NEW ORLEANS, March 16th, 1882.

"Received from Mr. John H. Wilberding the sum of fifty dollars, on account of agreement between him and Mrs. Widow Daniel Maher, in relation to sale of property situated No. 101 St. Ann street, between Bourbon and Dauphine streets, Second District, said sale to be for the price and sum of twenty-eight hundred dollars in cash.

"Signed: WIDOW DANIEL MAHER."

For defense, it is urged that an unforeseen event or circumstance makes it impossible for the defendant to perfect the sale. She avers that the property, which belonged to the community existing between herself and her deceased husband, is burdened with a general mortgage of $1,500, resulting from her husband's tutorship of four minor children, one of whom is yet only seventeen years of age. She acknowledges that she was aware of the tutorship aforesaid at the time that she entered into the agreement of sale with plaintiff, but she avers that the property having been purchased in her individual name, she was ignorant of the fact that, under the law, it had become community property, and as such liable for the debts of her husband, who had made her his universal legatee in his last will. She tendered the sum of fifty dollars, received under the agreement, but it was declined by plaintiff.

The case was tried by a jury, who returned a verdict against the defendant, whereupon judgment was rendered condemning her to execute a sale of the property to plaintiff, and imposing the following conditions:

"That the said defendant, Mrs. Mary Maher, widow of Daniel Maher, be ordered to execute and sign a good and sufficient deed and title to said property to said plaintiff, according to law, and the agreement herein sued upon, before Octave DeArmas, Notary Public of this Parish, and that, after having signed and executed such deed and title, and having caused to be discharged and cancelled all mortgages or privileges recorded against and bearing upon said property, that the sum of $2,750 be paid to her by said plaintiff; and, in the event that she should fail or neglect to discharge or cancel any of such mortgages or privileges, that the said plaintiff shall be entitled to retain in his hands such portion of said $2,750 as will be sufficient to pay and discharge such mortgages or privileges remaining uncancelled, until said defendant has discharged and cancelled the same."

The defendant appeals, and she is clearly entitled to relief.

In the first place, it is apparent on mere inspection, that the judgment does not in terms enforce the contract sued upon, which was a cash sale, but it orders a sale on entirely different terms, under which only thirteen hundred dollars are to be received in cash by the vendor, to whom the balance of the purchase price is to be paid at an indefinite time in the future.

It is conceded by all parties, and it is undeniable, under our jurisprudence, that if plaintiff had exacted a sale under the original terms, and had been willing to take the risk of the general mortgage, the defendant could have been coerced to the performance of her part of the contract. But the plaintiff formally declined that risk, and called for a transfer under a title free of the mortgage in question.

As it was impossible for the defendant to release the property from the mortgage, and as the jury had found in favor of the plaintiff, under his prayer, it is easy to appreciate the difficulty which the District Judge had to overcome in rendering and framing a judgment in accordance with the verdict of the jury, and to conform to the prayer of plaintiff's petition.

While we concede that the performance which he ordered is as near an approximation to a specific performance of the contract as the circumstances of the case would admit, yet, it is nevertheless true, that the contract which the judgment orders is materially different from that which the parties contemplated in their original agreement.

Hence, it follows, that the execution of that judgment, on these grounds alone, is forbidden by law, as well as by justice and equity.

But, in addition to these considerations, it appears conclusively to our minds that defendant, against whom no fraud has been proved, or even alleged, has shown circumstances which legally exonerate her

from the performance of her contract, which she had entered into under a palpable error of law.

The record shows that she had purchased the property in her individual name, and that, until better informed, she had always believed that it was her separate property, and not that of the community. She was truly informed of the existence of the facts, but she had drawn from them erroneous conclusions of law. C. C. Art. 1822.

She is, therefore, entitled to relief. C. C. Art. 1819.

Acting under similar views and guided by like considerations, this Court held, in the case of Williams vs. Hunter, 13 An. 476, that a penal clause, stipulated in a contract, could not be enforced against the defendant, who was shown to have agreed to sell a portion of a plantation which she then believed, in good faith, to be her lawful property, and to have subsequently discovered that she had no legal title to one-half of said property.

We, therefore, hold in this case, that the subsequent discovery of the general mortgage affecting the property, which was the subject matter of the contract sought to be enforced, coupled with the fact that the defendant has no means at present to release such mortgage, is a lawful excuse for the non-performance of her contract, and that the jury erred in their conclusions.

It is, therefore, ordered and decreed that the verdict of the jury be set aside, and that the judgment of the District Court be annulled and reversed, and that there be judgment against plaintiff, rejecting his demand and dismissing his action at his costs in both Courts.

Rehearing refused.

No. 8956.

JOHN LAUGHLIN VS. THE LOUISIANA AND NEW ORLEANS ICE COMPANY.

It is now the settled jurisprudence of the Supreme Court of the United States that, except in actions affecting personal *status*, or in those partaking of the nature of proceedings *in rem*, like suits to partition real estate, foreclose mortgages or enforce privileges or liens, substituted service, as against a non-resident, can be effectual as "due process of law," under the 14th Amendment to the Constitution of the United States, only where, in connection therewith, property in the State is brought under the control of the court and is subjected to its disposition by process adapted to that purpose. The question being federal in its nature, former jurisprudence of this Court on this subject must yield to the authority of the Supreme Court of the United States.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

W. S. Benedict for Plaintiff and Appellant.

Geo. C. Préot for Defendant and Appellee:

Personal service is necessary in a personal suit; substituted service by the appointment of a *curator ad hoc* does not constitute that "due process of law," contemplated in the 14th Amendment, Constitution U. S., and is in conflict therewith. Pennoyer vs. Neff, 95 U. S. Reports, p. 714 *et seq.*

Foreign corporations form a particular class of absentees specially provided for in Article 236 of the Constitution of Louisiana of 1879.

The opinion of the Court was delivered by

FENNER, J. Defendant, a foreign corporation, unrepresented in this State by any agent having authority to receive service of process, is sued in a personal action sounding in damages. Upon the simple averment that it owns property in the State, the attempt is made to bring the defendant into court by substituted service upon a curator *ad hoc* appointed by the court to represent the absent person. The curator *ad hoc* so appointed excepted to the jurisdiction of the court, on the ground that substituted service on a curator *ad hoc*, in a case of this character, and unattended by any process subjecting property of the absent defendant to the control of the court, does not constitute that "due process of law," contemplated and required by Section 1, of the 14th Amendment to the Constitution of the United States.

From a judgment maintaining the exception, this appeal is taken. We, at first, doubted whether the objection was properly raised at this stage of the proceedings, since, in the mere prosecution of the suit, no immediate attempt is made to "deprive" the defendant of "life, liberty or property," within the language of the amendment. We conclude, however, that if any judgment based on such substituted service would be an absolute nullity, incapable of any effect whatever against the person or property of defendant, it would be mere folly to permit the ear of the Court to be vexed with such useless and inconsequential proceedings. See Harkness vs. Hyde, 98 U. S. 478. The question is obviously one of federal constitutional law, in which practical common sense, as well as comity, require us, where we can do so without flagrant wrong to our judicial conscience, to follow the decision of the Supreme Court of the United States, since the appellate jurisdiction granted to that tribunal would render an opposite course merely vain and nugatory.

The question in hand has been exhaustively considered in the leading case of Pennoyer vs. Neff, 95 U. S. 714, and the Supreme Court of the United States there held that, except in actions affecting personal *status* or in those partaking of the nature of proceedings *in rem*, like

suits instituted to partition real estate, foreclose mortgage, or enforce lien or privilege, substitued service can be effectual against non-residents as "process of law," only where, in connection therewith, property in the State is brought under the control of the court and subjected to its disposition by process adapted to that purpose.

The very elaborate opinion of the Court and, still more, the dissenting opinion of Mr. Justice Hunt, establish that every possible objection to the doctrine was considered and overruled, and the Court has since expressly reaffirmed it. Brooklyn vs. Insurance Co., 99 U. S. 362; Harkness vs. Hyde, 98 U. S. 476.

The former decisions of this Court maintaining an opposite view, in 19 An. 36; 29 An. 821, and perhaps others, must yield to the above authority.

The hardship of the instant case, where the damages sued for are alleged to have been occasioned by the improper and unlawful use of property in the State belonging to the absent defendant, is recognized, but as the law of the State confers no privilege on the property for such damage, as it provides no process for subjecting the property to the control of the court as a basis of jurisdiction, and as Art. 236 of the State Constitution, requiring foreign corporations doing business in this State to appoint a resident agent upon whom process may be served, has not been complied with, nor enforced by legislative action, we are powerless to afford relief.

Judgment affirmed.

No. 8662.

FANNIE A. DARLING vs. LEHMAN, ABRAHAM & CO.

A married woman has the right to borrow money and to secure its return by mortgage on her property, with the authority of her husband, given concurrently with that of the District Judge of her domicil, or without it.

Where judicial sanction is obtained, the creditor is relieved from the necessity of proving the loan, and that it enured to her benefit: the burden is upon her, under proper charges, to prove that she is not liable. Where the sanction is not procured, the creditor is required to make the proof.

The authority of the Judge is cumulative, not restrictive or exclusive in character.

The power to compromise and to sell property implies, that of giving it in payment of a just debt of the principal. What the agent could have done indirectly, he can accomplish directly.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

W. S. Benedict and *A. Voorhies* for Plaintiff and Appellee.

E. D. White and *Braughn, Buck & Dinkelspiel* for Defendants and Appellants:

1. The plaintiff gave her full and express power of attorney to her father, investing him not only with power to administer, but to mortgage and sell her property.
2. The father borrowed $6,000, and secured it by mortgage on a plantation in which plaintiff was interested, as heir of her mother, jointly with her co-heirs.
3. The proof shows that the money was used for working the plantation.
4. A married woman does not need the authority of a judge to mortgage her separate property. She may do so with the authority of her husband. The Act of 1855, now C. C. 127, was intended to enlarge, not restrict, the power of married women. Rice Bros. vs. Alexander, 15 An. 54; Harden vs. Wolf & Cerf, 29 An. 333.
5. Having the power to act with the authority of her husband, no law restricts the exercise of the power through an agent duly appointed. Nugent vs. Starke, 30 An. 492; Calhoun vs. Mechanics' & Traders' Bank, 30 An. 774.
6. The debt enured to the separate advantage of the wife. The advances were made the agent to work her property. The mere fact that the agent bought supplies from the husband, and paid him for the advances, was not paying the husband's debts with the wife's money. It was simply paying a debt due him.
7. The fact, that instead of paying the husband for the supplies bought in money, the agent paid him in a draft on the merchant who was making the advances, and that the husband used this draft for paying his debts, does not constitute a payment of the husband's debts with the wife's property or money. The draft having been given the husband for the price of supplies by him sold, became the husband's property. He paid his debts with his own. He had acquired the draft for value; it was his, not his wife's.
8. Be this as it may, the draft was that of a partnership; not the wife's. The wife was a member of the partnership; the other members being her co-heirs. The partnership was distinct from its members. Paradise vs. Gerson, 32 An. 532.
9. The claim preferred by the wife, in this cause, for revenues during the very time the plantation was worked, with the advances made to her agent, which she now seeks to repudiate, is an admission which destroys her present claim. One cannot claim the revenues and repudiate that without which revenues could not exist. *Functus non intelliguntur nisi deductus impensis.*

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action by a married woman to annul a *dation en paiement* made by her agent of her fifth interest in a certain plantation, and to recover her share of the revenues of the property from the time she parted with possession.

The defence is, that the agent had authority to contract debts in her name, to secure them by mortgage on her real estate, to dispose of her property and that, having done so validly, his acts are binding on her.

From a judgment adverse to them, the defendants have appealed.

The power of attorney from plaintiff to her father, who acted throughout as her agent, was executed with marital authorization in the notarial form. It covers some six pages and apparently was designed to

provide for all imaginable contingencies. It specially delegates the power to administer, mortgage, compromise and sell.

The contention by the plaintiff seems to be predicated on the theory, that, as she was not authorized by the District Judge of her domicil to borrow money and to mortgage her property, to secure reimbursements, and, as her agent had no greater powers than she herself possessed, those who dealt with him did so at their risk and peril and can recover under no circumstance.

This is a fallacy. The theory was long since exploded.

A married woman has the right to borrow money and to secure its return by mortgage on her property, but the exercise of that right is subordinate, as a rule, to the authority of her husband, granted either concurrently with that of the District Judge, or without it. The authority given by the Act of 1855, now Article 127, R. C. C., is cumulative, not restrictive or exclusive in character.

In the first instance, the loan having been effected and the mortgage consented under judicial sanction, and steps being taken to enforce payment of the debt, with the security attached, the creditor is relieved from the necessity of seeing and of showing that the loan enured to the benefit of the married woman. The burden rests upon her, under proper charges of non-liability, implicating the creditor, to show that she is not indebted.

In the second instance, in which judicial authority was not obtained, it is incumbent on the creditor seeking payment to make the proof. 15 An. 54; 22 An. 457; 26 An. 402, 714; 29 An. 337; 30 An. 492; 28 An. 232, 494; 29 An. 123; 31 An. 734, 832; 30 An. 774, 812, 940, 1157; 32 An. 203, 1103.

In the case at bar, as the plaintiff was not authorized by the Judge, and as the power of the agent to borrow in her name is not disputed, she must recover, unless the loan was not contracted, or, if contracted, it did not enure to her benefit.

Hence, the questions to be examined are:

Has the agent borrowed for his principal, and, if so, how much?

Has the amount enured to the benefit of the plaintiff?

Was the debt contracted alive at the time of the settlement?

Had the agent the right or power to ratify it, by giving in payment the property of his principal?

The evidence, which it is useless to discuss, establishes satisfactorily that the defendants have advanced, at different times and in different ways, to the agent of plaintiff, sums of money and supplies which were employed to work the plantation owned by plaintiff and her four co-

heirs, and that the advances thus made and used, in the aggregate footed $8,796, for which the five owners were liable, subsequently swelling to $9,000.

Among the items figuring in the statements of advances are to be found drafts drawn by plaintiff's agent, in favor of her husband, who was engaged in the grocery business in this City on defendants, who settled them, but it is proved that they were thus furnished for supplies and provisions purchased from him by the plantation manager and which were used for plantation purposes. Whether those drafts were paid in money by the defendants, or placed to the credit of the husband, in part payment of an indebtedness of his to them, is immaterial, as it leads to the same result.

The record discloses a telling contemporaneous circumstance, going strongly to corroborate the fact of the indebtedness, that of a proper use and application of the advances of money and supplies, and that of a fairness and propriety in the *dation en paiement*. It is this: that the other co-proprietors were parties to the acts of mortgage and transfer of the property, and are not heard to charge error or fraud, or any reason destructive of the several transactions had in the matter, or in any manner to complain of injustice, or even injury. There is not even a whisper on that subject, calculated to cast the least reflection on the dealings of the parties; none surely to assail the good faith and character of the defendants.

The power to compromise and to sell the property implies that of giving it in payment of a just debt. The agent unquestionably could have sold the property to the defendants, receiving the price with one hand and paying it out with the other, in extinction of the debt. It would have been an idle ceremony to have done so. In such a case, that which the agent could validly have done indirectly, could be legally accomplished directly.

There is no evidence that the property has netted any revenues, susceptible of division among the co-proprietors.

The defence is well founded, and plaintiff must succumb in her action.

It is, therefore, ordered and decreed that the judgment appealed from be reversed, and that judgment be and is now rendered in favor of defendants in both Courts.

Rehearing refused.

No. 8943.

THE STATE EX REL. C. B. HAUK VS. H. L. LAZARUS, JUDGE.

The power of determining or deciding whether the facts, as set out in a bill of exception, are true, must of necessity rest with the trial Judge. Any other rule would be impracticable, and would lead to endless dispute and inextricable confusion.

APPLICATION for Writ of Mandamus.

A. Brieugne and *Sambola & Ducros* for the Relator.

Robt. Mott for the Respondent.

The opinion of the Court was delivered by

MANNING, J. On the trial below of the suit of Hauk vs. Nicholson, the relator, who is the plaintiff in that suit, alleges that he requested the court to charge the jury as set forth voluminously in the petition now before us, and at the same time excepted to the charge as given by the court, and by agreement between counsel on both sides and the Judge, the relator was to have a few days time to draw his bills, and that within the time so allowed, his bills were drawn and exhibited to the opposing counsel, and presented to the Judge in open court, who promised to examine them and sign them if found correct. This was in last April. He further alleges that he repeatedly requested the Judge during the summer to act on his bills, who promised to do so, but who finally, about the beginning of September, peremptorily refused to sign the bills, assigning as a reason that he had recently prepared a statement of the case which would serve instead of the bills.

The Judge's version is, that his charge was reduced to writing, and after its delivery Hauk's counsel reserved a bill to it without specifying any particular fact, and also presented nine written requests to charge, some of which he gave, and qualified or refused others—that after the verdict of the jury had been rendered, the Judge asked Mr. Ducros, one of Hauk's counsel, whether a bill of exceptions would be prepared, who answered there would be no appeal, and that Hauk's counsel requested the short hand writer not to translate the testimony as there would be no appeal—that nothing was done with the requests and exceptions until June, and when an appeal was taken and he was requested to sign the bills of exceptions, he refused because they do not fairly state his ruling, but that he prepared a bill, based upon his notes taken by him on the trial, of the requests and his rulings thereon, and annexes it to his answer.

All that a Judge can be required to do is to sign a bill that presents the facts in accordance with his recollection, and when he has taken notes at the time instead of trusting to memory alone, there is greater assurance of accuracy. The power of determining, or rather the right of deciding, whether the facts as stated in a bill are true or not, rests with the Judge. All courts so hold, because a different rule would be impracticable and lead to endless dispute and inextricable confusion. He is justified in refusing to hear testimony contradicting his recollection of the facts, State vs. Gunter, 30 Ann. 536; and we cannot do what we justify him in not doing. When therefore the Judge has prepared a statement of the facts and his rulings on the law which he has incorporated in a bill, or is ready to do so, and sign it, we cannot order him to do more, since that is all he is bound to do.

The mandamus is refused at the relator's cost.

No. 8707.

JOSE LACIANO VS. B. H. FLASPOLLER.

A claim of damages for an alleged tort is barred by the claimant's consent to and active assistance in the performance of the act which produced the damage.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

H. L. Edwards and *J. S. Adams* for Plaintiff and Appellant.

J. H. Ferguson for Defendant and Appellee.

The opinion of the Court was delivered by

MANNING, J. This suit is for the recovery of $6,760.00, as damages for taking out of and away from the plaintiff's shop, without warrant of law, a lot of goods which at sale by public auction realized $79.70.

The items of this demand are:

Actual damages for the loss of goods	$ 800.00
Prospective profits	960.00
Ruined credit	3,000.00
Exemplary damages	2,000.00
	$6,760.00

The claim is preposterous. The lower Judge found that it was unsupported, and gave judgment for the defendant.

The plaintiff had bought a lot of groceries from the defendant, and owed $500 or thereabouts for them. The defendant could get neither

pay nor any satisfaction, but promises to pay only, whereupon he proposed to take back his goods or what remained of them. The plaintiff consented to it, and assisted in removing the goods to a dray and float. Whatever might have been his rights to redress for an invasion of his shop, and amotion of his stock without his consent, he can claim none where he has not only consented to the defendant's removal of the stock, but actively assisted therein.

Judgment affirmed.

Rehearing refused.

No. 8936.

THE MAYOR AND CITY COUNCIL OF MONROE VS. FRED. S. MEUER.

Violations of the ordinances of a city, passed in the exercise of the express or implied powers vested in municipal corporations, and relating to acts not included in the criminal laws of the State, cannot properly be regarded as crimes to which the constitutional guarantees of prosecution, by indictment or information and trial by jury, pertain.

The constitutional prohibition against slavery or involuntary servitude does not relate to the mode of punishment of any class of offenders, but was directed against any attempt to reëstablish the system of slavery once prevailing in some of the States, or any species of servitude resembling it.

Likewise, the prohibition against fixing by law the price of manual labor, refers exclusively to contract labor. Hence, where a party was sentenced by the Recorder of Monroe to pay a fine of $50 for keeping a disorderly house, and in default of payment, to work on the streets of the city at the rate of one dollar per day until the same were paid, is not illegal and void.

APPEAL from the Recorder's Court of the City of Monroe. *Trousdale*, J.

Franklin Garrett for Plaintiff and Appellee.

R. G. Cobb for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was sentenced by the Recorder of the City of Monroe, after trial before him, to pay a fine of fifty dollars and costs, for keeping a disorderly house, and, in default of payment, to be imprisoned, and work on the streets at one dollar per day, until the fine and costs were paid.

From this sentence he has appealed, and among other defenses urged, and the only one we can notice under our limited jurisdiction, he contends that the city ordinances and charter authorizing such sentence are violative of the Constitutions of 1868 and of 1879, and, consequently, null and void.

1. The Articles of the two Constitutions charged to be violated are those which provide for prosecution of criminal offenses, by indictment or information, and the right of trial by jury in such prosecutions; also which prohibit slavery or involuntary servitude, except for crime; and the Article in the Constitution of 1868, which prohibits the fixing by law of the price of manual labor.

The charter in question confers on the city full and complete police authority for the preservation of the peace, good order, safety and health of the place, and also to abate nuisances.

Under this power, doubtless, the ordinance complained of against keeping a disorderly house was passed.

An examination of the authorities bearing on this interesting question satisfies us that offenses against ordinances passed in the exercise of the express or implied police powers vested in municipal corporations, and relating to minor acts and matters not included in the criminal statutes of the State, are not properly regarded as *crimes*, to which the constitutional provisions, relating to prosecutions and trial by jury, refer.

To insure the prompt and efficient exercise of the police authority with which municipal corporations are ordinarily clothed, the trial of offenders must be speedy, and the punishment summary, which are impossible of attainment under the slow and formal methods of prosecuting by indictment or information, and trial by jury.

The power or right of the legislature to confer such authority on towns and cities is expressly provided in Articles 92 and 136 of the present Constitution.

The distinction between crimes against the State and mere violations of municipal ordinances, and the bearing of the constitutional provisions referred to, touching the respective modes or methods for the prosecution and punishment of offenders against the same, is clearly recognized by elementary writers on the subject, and confirmed by frequent adjudications. Dillon, Mun. Corp., 2d Ed., Vol. 1, pp. 451 *et seq.*; Cooley, Const. Lim. 596; Sedgwick, Stat. and Const. Law, 548, 549; 15 An. 190; 33 An. 1011; 4 Ga. 509; 14 Ga. 358; 38 Ga. 542; 9 Minn. 166, 186; 42 Penn. St. 89; 33 N. J. Law, 213.

2. The constitutional prohibitions against slavery or involuntary servitude have, we conceive, no real bearing on the question before us. They were evidently directed against any attempt to reëstablish slavery, such as had but recently been abolished, or any system of servitude resembling the same. This is the more evident from the exception contained in the Articles.

3. The inhibition in the Constitution of 1868, against laws fixing the price of manual labor, evidently had reference to contract labor to be performed under contract and, therefore, has no applicability to the case before us. There is no question touching the payment of the costs.

We see no force in any of the grounds urged against the sentence appealed from.

Judgment affirmed.

[NOTA.—The following two opinions, only reported by syllabi in the 34th Annual, (see page 1235,) are now reported in full, on account of the importance of the subject disposed of in them.]

No. 8586.

STATE OF LA. EX REL. J. E. BROWN VS. W. T. HOUSTON, JUDGE.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *certiorari* and for a *habeas corpus*.

The relator complains that he was committed to jail for ten days, for contempt of court, under circumstances which do not justify his imprisonment, and that he should be released from custody.

A copy of the commitment is attached to the application. It recites that the relator was found guilty of contempt after due trial, on rule, and it sets forth reasons in support.

A writ of certiorari lies in such cases only, from which it appears that the proceedings are absolutely null.

In the present instance, the proceeding seems to have been instituted and conducted contradictorily with the relator. The writ shows that he has had a trial, according to the forms of law, and was sentenced after hearing.

It does not appear that the regularity of that proceeding is in the least questioned.

It has been repeatedly held that in applications for a *certiorari*, this Court is limited in its enquiry to an examination of the extrinsic and not of the intrinsic correctness of the proceeding; in other words, to questions of form and not of substance. It is sufficient that a court has jurisdiction, and that it has exercised it in a proper form to justify this Court in abstaining from interfering with its action, unless in exceptional cases rarely to occur, of which that before it is not one.

The defendant Judge had a right to compel by rule the appearance before him of the relator, on a charge of contempt, to try the rule and to punish him if found guilty of the offense, by fine and imprisonment,

within the limits fixed by law. C. P. 131, 132, 857; 32 An. 217, 549, 553, 719, 1092, 1222, 1256; 33 An. 16; Wells on Jurisd., 178 *et seq.;* 36 Miss. 33; 37 N. H. 451; Cooley on Torts, 422; Blackstone, B. iv, c. ix, (3) 284; 29 Wall. 505; Hurd on Habeas Corpus, 7.

While conferring upon this Court the power of issuing *habeas corpus*, the Constitution has expressly restricted the right to cases within its appellate jurisdiction, which was not enlarged or extended by Article 90, vesting it with a general supervision and control over inferior courts. 30 An. 672; 32 An. 1225.

Whatever may have been held, touching the right of appellate courts to review the action of an inferior court, on a question of contempt, it does not appear that it has been exercised in proceedings other than those for a *habeas corpus*. 24 N. Y. 75; 7 Cal. 181; 14 Gray, 226; 1 Grant's cases, 453; 39 Penn. 30; 10 C. B. 3; 2 Daly N. Y. 530; 13 Md. 621; 34 Tex. 618; 21 C. 442; 2 Cr. C. C. R. 612.

As this Court has no power to issue a writ of *habeas corpus*, unless in a case in which it would have an appellate jurisdiction, and as it has none in the present instance, it follows that it cannot pass upon the validity of the action of the District Judge. This was formally decided in the case of Wood, 30 An. 672; 9 An. 522; 15 An. 120.

Conceding that the interdiction matter, or case alluded to in the commitment, is an appealable matter, that does not render the contempt proceeding itself appealable. 30 An. 672; 32 An. 1225.

We see no necessity, as the showing made does not justify it, to order either the production here of the original proceedings, or the appearance of the relator, together with the cause of his caption and detention. The averments of the petition and the recitals of the commitment accompanying it, authorize a refusal of the relief sought, on the face of the papers.

It is therefore ordered that the application be refused at relator's costs.

No. 8598.

STATE EX REL. O'MALLEY VS. W. T. HOUSTON, JUDGE.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The petition for a prohibition and the return of the defendant thereto, are, on the face of the papers, submitted for adjudication.

The relator complains that he was condemned for contempt of court, and committed to jail for ten days, under circumstances which do not

justify the sentence and his imprisonment; that in thus acting, the District Judge has usurped a jurisdiction with which the law does not vest him. He prays that a restraining order issue, and that, after due course of law, the provisional prohibition be perpetuated.

The Judge urges that the relator is not entitled to the relief sought, because a prohibition does not lie in such a case, and because the facts justify his action.

In the case of State ex rel. Brown vs. the same Judge, recently decided, which was an application for a *certiorari* and for a *habeas corpus*, to test the validity of a commitment for contempt of court, we declined relief for the double reason, that the proceedings assailed appeared to have been regularly conducted, and that we have no jurisdiction in matters of *habeas corpus*, unless in cases in which we can have appellate jurisdiction.

It appears in this instance that the acts charged as not constituting a contempt, not having been committed within the presence or hearing of the court, the rule was issued and tried contradictorily with the relator, and that, after trial, the Judge considered that under the circumstances, the defendant therein was guilty of a contempt of his authority, and ordered his confinement for ten days.

A prohibition is allowed against an inferior court only where it exceeds the bounds of its jurisdiction. C. P. 845.

The moment that such court acquires jurisdiction over a cause, it becomes vested with power to enforce it, by rendering and carrying out all orders which precede or follow judgment, and to finally adjudicate upon it.

All courts possess the inherent power of bringing to their bar and punishing for contempt of their authority, not only the parties to the litigation, the jurors, the witnesses, the officers of the court, but also offenders not connected with the controversy, whenever they impede or obstruct the process of the court, disturb its proceeding, insult its officers or commit any act which interferes with or thwarts its administration of justice. Each court has necessarily the power of determining for itself, whether the act or acts thus done constitute or not a contempt of its authority, and, where it has exercised that power and passed sentence, in the manner and form prescribed, and within the limitations fixed by law, it does not appertain to this Court, as a rule, to inquire into the facts passed upon, with a view to ascertain and determine whether a contempt was or not actually committed and to release the convicted offender. 32 An. 1256, 1225.

The regular ruling of a Judge on a question of contempt is no more revisable than his regular ruling in an unappealable case.

It is an essential, privileged and significant attribute, which should be exercised with independence, but with discretion and dignity.

It is unfortunately possible, that forgetful of his mission of peace and conciliation, a magistrate may palpably ill use that conservative power, so as to become reproachable with oppression in office, but, in such instances rarely to occur, the question of abuse of authority cannot be determined and remedied against by the process now sought. Wells on Jurisdiction, p. 178, § 179.

The District Judge had jurisdiction and has regularly exercised it. C. P. 131.

Whatever may be the extent of our supervisory powers or jurisdiction over inferior tribunals, we do not think that, under the showing made in this case, we should allow the relief demanded. 32 An. 1092, 1182; 33 An. 923.

It is therefore ordered that the application be dismissed with costs.

[NOTE.—The authorities in the Brown case are relied upon in this case.]

ERRATA—

P. 234, "They do not affect it all," should read "They do not affect it at all."
P. 256, "existence" should be "resistance."
P. 607, "Nor is it elsewhere," should be "Nor is it different elsewhere."
P. 671, "judicial contraction" should be "judicial construction."

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN NEW ORLEANS, DURING THE YEAR 1883,

AND NOT REPORTED IN FULL.

No. 8873.

The State ex rel. Annie Martin et al. vs. Judge of Eighth Judicial District.

Mandamus refused, to compel a District Judge to render a particular judgment.

No. 7567.

White, Richards & Co. vs. A. D. Grief.

Sheriff not held liable for refusing to collect rents of seized property, under certain circumstances.

No. 6918.

David Wallace, Liquidator, vs. Wyche & Morgan et al.

After dissolution of partnership, former partner cannot be cited out of his domicil.

No. 8836.

M. T. Pitkin vs. The Sheriff et al.

Appeal dismissed when transcript does not contain copy of judgment appealed from.

No. 8904.

The State ex rel. Wm. B. Berthoud, President, etc. vs. Hahn, Judge, etc.

Suspensive appeal does not lie from decree of District Judge, accepting bond and sureties of sheriff, under certain circumstances.

No. 8847.

John Janney vs. Silas Lillard et al.

Mortgage granted by part owner of land, will operate upon his undivided part.

No. 8490.

L. O'Donnell vs. T. McDermott.

This case involves issues of fact only.

No. 8351.

Mrs. D. Fleitas vs. W. F. Halsey.

When attachment is dissolved for non-compliance with the technical requirements of the law, the attaching creditor is liable for actual damage.

No. 8630.

G. McNeil et al. vs. Railroad Co.

Case of gross contributory negligence on the part of the party injured.

No. 8016.

C. F. Caruthers vs. Vaiden, Hawkins & Roberts.

This case involves questions of fact only.

No. 8326.

S. Hermann vs. S. Block.

Case decided upon the preponderance of evidence.

No. 8682.

J. A. Stevenson vs. Mrs. Cassidy and Husband.

Damages recovered by a neighbor, from a tenant who misuses the hydrant, privies, etc.

No. 8014.

E. D. Seixas et al. vs. T. S. Waterman et al.

Revocatory action prescribed by one year.

No. 8820.

Baton Rouge Oil Works for Monition.

Purchaser at tax sale, which is set aside, entitled to recover taxes paid by him and the value of useful improvements.

No. 8723.

Succession of Mary Unforsake.

The rights of an adopting parent, upon the property of an adopted child, cannot be determined upon a petition, merely setting forth that the under-tutor is about to have an inventory taken, and praying that the order for it be stayed.

No. 8860.

J. A. Stevenson vs. A. Shultz et al.

Parol evidence cannot be received to establish a verbal agreement to make repairs, made at the time of, and prior to signature of a written lease, when the latter admits the property to be in good repair and obliges the tenant to keep it so.

No. 8062.

J. D. Lobdell vs. Mrs. J. S. Clark.

Appeal dismissed because the transcript does not contain the evidence on which the case was tried below.

No. 8042.

R. F. Harrison vs. L. T. Murdock et als.

The sureties on the bond of an officer elected for one year, cannot be held liable for acts done by him during a year different from that covered by the bond.

No. 7990.

J. Kaiser vs. New Orleans.

Case identical with that of Bergen vs. City of New Orleans, recently decided and reported.

No. 7574.

T. P. Leathers vs. J. W. Cannon et als.

A policy of insurance issued on a steamboat to cover the losses on the entire boat, owned by several parties, for the account of present owners, loss, if any, payable to one of said owners, who contracted for the insurance, will enure to the benefit of each owner of the boat in the proportion of his virile share, although the party effecting the insurance claims that he intended to insure his share only, and for his exclusive benefit.

Having received the policies stipulating to cover the whole property, for the account of present owners without objection, and having collected the insurance money under the policies thus conditioned, he will be held to have ratified the contract as evidenced by the policies.

No. 8810.

W. D. Carmichael vs. J. B. Askew.

Suit on joint note of husband and wife. Exception of no cause of action against the wife maintained and no appeal taken therefrom. Plaintiff cannot complain that judgment is rendered against the husband only for his virile share.

No. 8826.

New Orleans vs. Factors' & Traders' Insurance Co.

The city budget for the year 1882, having been adopted in accordance with law in December, 1881, and the license tax therein levied, being within the limits prescribed by Act No. 119 of 1880, then in force as the State license law, cannot be affected by Act No. 4 of 1882, which can have no retroactive effect.

No. 8882.

The State vs. J. Johnson et al.

For an exceptional criminal case, this Court will *proprio motu* issue an order to the Clerk of the District Court to complete the transcript, defective by his fault.

No. 8934.

The State ex rel. Baumgarden et al. vs. The Judge, etc.

A mandamus does not lie to compel a District Judge to issue a writ of possession on an *ex parte* application, where opposition is apprehended, where the judgment on which the application is founded does not justify the demand, and where part of the property is under the control of independent judicial authority.

No. 7954.

U. Bourg vs. D. A. Given & Son.

This case involves only questions of fact.

No. 8824.

Mrs. C. H. Gibson vs. B. F. Hitchcock et al.

Where an appeal is taken by a wife, whose husband is not a party to the suit, and is unrepresented by counsel of record, the signature of the bond of appeal, by the attorney of the wife in the name of the husband, is not sufficient evidence of the latter's authorization to maintain the appeal, which must therefore be dismissed.

No. 8059.

E. W. Burbank vs. J. H. Oglesby.

A commercial partner cannot sue upon a particular item of the partnership business, but must provoke a settlement of the entire partnership and sue for the balance on account. Prescription therefore does not commence to run, until the dissolution of the firm.

All matters that are fairly chargeable to the partnership, and that were undertaken for its account, will be so held and charged, and the acquiesence in and non-complaint of them during the existence of the partnership, will be considered as corroborating proof, that both partners so understood them.

No. 8709.

New Orleans vs. F. A. Blanks et al.

This case involves only an issue of fact.

No. 8701.

A. Weber vs. Brooks, Norton & Conners.

This case involves only an issue of fact.

No. 8689.

R. E. Rivers vs. A. Hero, Jr.

Parol evidence admissible to show that certain movable property was not included in the sale of a plantation.

No. 8331.

Mrs. M. Morris vs. Union Bank.

This case was decided upon the evidence.

No. 8066.

Fayssoux & Coleman vs. New Orleans.

An appeal should not be dismissed when the deficiencies in the transcript are not attributable to the appellant.

Nos. 8065–8066.

Bartley & Fayssoux vs. New Orleans.
Fayssoux & Coleman vs. New Orleans.

Future and entirely contingent or eventual profits cannot form the basis of a judgment for damages.

No. 8063.

T. Drouet vs. L. Leconte.

This case involves only questions of fact, upon which the court will not disturb the finding of the jury.

No. 8927.

Wm. Bogel vs. H. A. Peeler.

An appellant who has obtained the consent of the appellee to the dismissal of the appeal, has the right to discontinue the motion to dismiss, as long as it has not been acted upon by the court, where it does not appear that the dismissal is the result of a compromise or contract which has vested some right in the appellee.

No. 8660.

Ernst & Co. vs. Mrs. A. Kirsch et al.

Thts case involves only questions of fact.

No. 8976.

The State vs. W. H. Wallace.

Appeal dismissed for want of either a bill of exception, motion in arrest of judgment or an assignment of errors.

No. 8937.

New Orleans Water Works Co. vs. S. Hernsheim & Bro.

This case is identical with that of the City of New Orleans vs. the Water Works Company, recently decided and reported.

No. 8373.

J. Bataille vs. A. Ribet.

An agent without compensation is bound to use prudence in administration only, and cannot be held liable for losses which such administration could not avail.

No. 8886.

The State ex rel. H. N. McCrea vs. Livaudais, Judge, etc.

A District Judge who orders a case to be removed from the jury to the court docket, does not exceed the bounds of his jurisdiction. A Prohibition is not the proper remedy to prevent him from trying the case.

No. 8893.

The State ex rel. Doran vs. Lazarus, Judge, etc.

A mandamus does not lie to compel an inferior Judge to render a particular judgment.

MONROE.

No. 1099.

Mrs. H. Rush vs. G. B. Rush, Administrator.

The widow in community is not required to give bond as usufructuary of the community property.

OPELOUSAS.

No. 1168.

The State vs. Moses White.

Criminal case.

The record establishes a fair trial, legal conviction and proper sentence. The judgment is affirmed.

No. 1171.

The State vs. Henry Dickenson.

Criminal case.

The record presenting no suggestion of error, and none being assigned in this Court, the judgment is affirmed.

No. 1192.

M. Billiaud vs. Morgan's R. R. Co.

This case presents the same issue as that of St. Julien vs. Morgan Louisiana & Texas R. R. Co., recently decided and reported.

No. 1207.

Mrs. S. Sandoz et al. vs. Mrs. A. Duhon et al.

Although the allegations of the petition do not affirmatively fix the amount in controversy as within the appealable sum, if these are supplemented by allegations of the defendant, and from both combined it appears that the object sought to be recovered is worth more than $1000, the appeal will be maintained.

No. 1194.

H. S. Buckner vs. Thomas Mora.

Case of third opposition dismissed on the exception of no cause of action.

SHREVEPORT.

No. 117.

S. W. Vance et al. vs. Pickett et als.

Motion to make new parties allowed and the case continued to next term.

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ACTION.

An action by part of the heirs for a "partition" of the estate of their mother will not be regarded in that light when it is apparent that there exists no such property to be partitioned, unless a renunciation of the community by the mother be previously set aside.

The action will be considered as a disguised one, for the nullity or rescission of such renunciation, and as such barred by the prescription of five years.

L. Ferrand vs. *Heirs of Brès et al.*, 908.

APPEAL.

Damages are allowable for a frivolous appeal from a judgment dissolving an injunction without prejudice to the rights of appellee for other damages by action on the injunction bond.

M. Carroll vs. *Chaffe, Syndic*, 83.

Damages will not be allowed, even if the appeal be frivolous, where it is *devolutive* only, and, therefore, has not delayed the appellee in the execution of his judgment. Having sustained no loss consequent on the appeal, appellee cannot recover such damages.

Chaffe, Syndic, vs. *M. Carroll*, 115.

A testamentary executor has the legal right to take and prosecute an appeal, in his official capacity, from a judgment placing the heirs in possession of the property of the succession, for which said executor had been appointed and qualified.

A bond of appeal signed by him in his capacity of executor is valid. The appearance of an appellee and urging other grounds of dismissal before that of want of citation, cures the defect of such want of citation of appeal on him.

Succession of Mrs. T. Baumgarden, 127.

When property of a judgment debtor exceeding $1,000 in value is seized in the hands of a garnishee, who asserts a right of pledge thereon for an amount exceeding $1,000, the matter in dispute between the seizing creditor and the garnishee, in proceedings under the garnishment, is appealable, although the amount of the seizing creditor's judgment may be less than $1,000.

H. Bier vs. *Gautier & Godchaux*, 206.

An appeal will lie from an order putting one in possession of an estate, when there has been no judgment to that effect. An order made

APPEAL—*Continued.*

ostensibly to execute a judgment will be vacated, if it appears that no judgment, such as would justify the order, has been rendered.

Denegre & Villeré vs. *A. Bayhi*, 255.

An appeal will not be dismissed if the appellees have not been cited, where the petition prays for citation and where a provisional syndic appeals from a judgment denying him the right to render his account, through the court, to a definitive syndic. Such judgment is not an interlocutory, but is a final judgment, from which an appeal lies.

T. R. Wood vs. *Creditors*, 257.

In neither suspensive nor devolutive appeals is citation necessary, when the appeal is taken by motion in open court at the same term when the judgment is rendered.

Judgments of courts, other than those of New Orleans, take effect only from the last day of the term at which they were rendered. Whatever may be their actual date, their legal date is the last day of the term, and therefore a party cast has ten days from the adjournment of the court in which to file his bond for a suspensive appeal.

S. L. Boyd vs. *Labranche, Sheriff*, 285.

Where it is apparent that an appellee can recover from a surety on an appeal bond the amount of the judgment appealed from, if affirmed, the appeal will not be dismissed owing to alleged deficiencies in the bond.

A. Baldwin & Co. vs. *Mumford et al.*, 348.

Where the only stipulated condition in an appeal bond is that, if the appellant shall well and truly pay, or cause to be paid, all such damages as the appellee may sustain in case it should be decided that the appeal was wrongfully obtained, the obligation is to be void, or else to remain in full force and virtue in law; the bond will not be considered as given under the law regulating the form and substance of appeal bonds.

The bond herein furnished is worded as are those required for conservatory writs.

No legal bond having been given, the appeal is dismissed.

Succession of M. Calhoun, 363.

Where the transcript does not contain the ordinance or resolution of the town council, under which the appellant was fined, or information of any kind of the terms and scope of the ordinance, the fault is imputed to the appellant, and his appeal will be dismissed.

Baton Rouge vs. *Cremonini*, 366.

APPEAL—*Continued.*

An appeal taken by petition cannot be made returnable before the expiration of the delay computable for the distance from the domicile of the appellee to the place where the appellate court is held.

Picard & Weil vs. *L. Privol*, 370.

An interlocutory degree in the lower court, sustaining plaintiff's motion to strike out of defendant's answer a reconventional demand, not signed by the Judge, is not an interlocutory judgment causing the defendant an irreparable injury, and is, therefore, not appealable.

When, in a petitory action, the defendant claims possession and use of a portion of the property in suit, under a contract or agreement with plaintiff, the title to the property and the possession of the main portion of the same are no longer in dispute, and will, therefore, not be considered as a part of the matter in dispute, which is thus restricted to the value of the right of occupation set up by the defendant.

J. L. Harris vs. *L. E. Stockett*, 387.

Examination of the differences between interlocutory and final judgments.

G. W. Cary vs. *J. P. Richardson*, 505.

A suspensive appeal lies from an interlocutory order permitting a plaintiff to bond sequestered property. Such bonding may cause irreparable injury.

Such appeal can be sought by an intervenor, in whose possession the property was when sequestered.

A mandamus lies to compel the granting of such an appeal.

State ex rel. Street vs. *Judge, etc.*, 515.

The lower court can and must pass upon the sufficiency of the appeal bond, when it is disputed by the appellee; and when the bond has been adjudged insufficient, and no other is furnished, the appeal will be dismissed.

J. Baker vs. *Shultz et al.*, 524.

The settled practice is to consider the surety to the injunction bond a party to the appeal without mention of him in the motion for appeal if his principal be appellant, and without citing him if the appeal is by petition, his principal being appellee.

L. Lavedan vs *F. F. Trinchard*, 540.

When two suits between the same parties are consolidated, they henceforward form but one, and when thus tried and decided and judgment rendered, the party cast must appeal from that judgment if he wishes relief.

APPEAL--*Continued.*

If in such a case the Judge signs another judgment, adapted to one only of these suits, and none is signed in the other but only a bill taken to his refusal to sign it, the appeal taken from the second judgment will not be dismissed, but that judgment will be annulled.

M. Vascocu, Adm'r, vs. *Woodward, Co-Executor,* 555.

The Court will not proceed to the examination of a case on an incomplete record, and where the missing paper is a part of the pleadings and has been lost, and no attempt has been made by the appellant to reproduce its contents by proceedings in the lower court contradictorily with the appellee, the appeal will be dismissed. The fault is especially imputable to the appellant where a prior appeal in the same cause has been dismissed by this Court for want of the same paper.

J. H. Smith vs. *Orleans R. R. Co.,* 559.

It is not necessary that the principals to an appeal bond should sign it. When it is signed by another, not a party to the suit and not a witness to the signatures, he will be held to have signed it as surety, although his name is not set out in the body of the bond.

J. E. Vignie vs. *Brady et al.,* 560.

Grammatical or clerical errors do not vitiate proceedings, if there be no ambiguity or uncertainty.

It is not needful that interlocutory judgments be signed by the Judge, and they may be appealed from when they may cause irreparable injury.

It is in time if the blank of the appeal bond where the amount is to be inserted is filled before the return day and before the appeal is brought up.

The petition of appeal recited the name of the suit and the judgment rendered in it, from which the appeal was taken, and the citation was addressed to the appellee without adding the title "liquidator," which had been conferred on him by the judgment; *held,* the citation was sufficient.

B. Klotz vs. *Macready et al., Executors,* 596.

Where an appeal is taken from a judgment dismissing an opposition to the homologation of an account of a syndic of an insolvent, and granting a discharge to the insolvent, and neither the creditors of the insolvent nor the syndic are made parties to the appeal, the appeal will be dismissed.

R. Rosenthal vs. *Creditors,* 618.

An order dismissing an appeal, by consent of opposite counsel, will not be disturbed by this Court on the complaint of one of the liti-

APPEAL—*Continued.*

gants that his attorney had no authority to give such consent, where there is presented an issue of facts, by affidavits and counter affidavits, requiring the exercise of an original jurisdiction.

A. Walz vs. *R. R. Co.*, 628.

The order of appeal making it returnable "on the — day of November, 1881," the appellant appeared in the court *a qua* on the 15th of that month and, suggesting the omission, asked that it be supplied, and that the 21st of November, 1881, be named as the return day. It was so done by the District Judge, and the appellant filed the transcript in this Court on said 15th of November. *Held*, that the fault was not attributable to the appellant; that the transcript was filed in good time, and that no citation on appellees was necessary in the premises.

Union Bank vs. *Legendre et als.*, 787.

Fault is imputable to an appellant, owing to deficiencies in the transcript of appeal, where it appears that the transcript was prepared in part by appellant's counsel, who had the making of it under his control and supervision.

A transcript is fatally incomplete, when it does not contain copies of certificates of registry of acts which, according to the note of evidence, were introduced in proof, and where it does not show that plans, bound with it, and bearing no character of authenticity or filing, are identically those received in evidence.

A motion for a *certiorari* to perfect the transcript, made after a motion to dismiss has been filed, and on the day of trial, cannot be granted where the transcript is defective by the fault of the mover.

Torres et al vs. *F. Falgoust*, 818.

Where an appellant fails to file the transcript on the return day, or within the legal delays thereafter, and his appeal is dismissed because such failure is imputed to his fault, he cannot renew his appeal thereafter.

The failure to seasonably file the record, without legal excuse, is considered as an abandonment of the appeal.

Mrs. Sterling vs. *Heirs of Sterling*, 840.

A motion to dismiss an appeal cannot be predicated upon a charge that the appeal is frivolous. Damages claimed because an appeal is frivolous cannot be allowed in a motion to dismiss.

W. H. Thomas vs. *Guilbeau, Sheriff*, 927.

APPEAL—*Continued.*

No appeal lies from a judgment by default rendered and signed prior to Act 24 of 1876, amending and re-enacting Art. 575, C. P., where more than one year has elapsed since the passage of that law.

Prescription of the right of appeal runs from the passage of said statute.

S. Webb, Wife, vs. *A. E. Keller*, 930.

When the record contains no order granting the appeal, it must be dismissed.

An original document purporting to be a certificate of the Judge of the District Court, declaring that the order of appeal had been granted, and directing by order at chambers that the minutes of the court be corrected, never entered or filed in the District Court, but offered for original filing in this Court, after the unreserved submission of the motion to dismiss, comes too late, and, even if considered, must be treated, not as a part of the proceedings in the District Court, but as a mere certificate of the Judge to the facts stated therein, which cannot avail to cure the absence of the order of appeal.

F. K. Phillips vs. *Creditors*, 935.

Where an appeal bond was given for the amount prescribed in the order for a suspensive appeal, and was filed within the time prescribed for such appeal, it is a good bond for a suspensive appeal, though it is recited in the body of the bond "that an appeal, suspensive or devolutive, was granted," and it is not stated for which appeal the bond was given.

E. & E. Thomas vs. *N. Bienvenu*, 936.

In a suit involving the correctness of the assessment of plaintiff's property, the jurisdiction of the Supreme Court must be tested by the amount in dispute, which is the tax which would be due on the difference between the assessment complained of and the assessment urged by the taxpayer. If such a tax does not exceed one thousand dollars, the appeal must be dismissed.

J. Block vs. *Assessor*, 965.

A judgment, partly in favor of and partly against an appellant, will not be disturbed as affecting the appellee, where no amendment is asked.

J. M. Payne vs. *T. C. Anderson et al.*, 977.

An appeal made returnable on appellant's own motion and suggestion, at a time and place other than those provided for by law, will be dismissed by the Court *ex proprio motu*. This rule applies equally in civil cases to the State, or to any of its officers appealing in their official capacities.

State ex rel. Lee vs. *Auditor, etc.*, 980.

APPEAL—*Continued.*

In proceedings *in rem*, as in ordinary cases, the jurisdiction of the appellate court must be tested by the amount in dispute, as shown by the amount claimed in the pleadings, and not by the value of the property attached, or by the amount of the judgment which is, or may be, subsequently rendered in the case.

Kahn & Bigart vs. *Sippili*, 1039.

A suspensive appeal having been dismissed for insufficiency of the transcript, the appellant is entitled to a devolutive appeal, if applied for within a year from the rendition of the judgment.

State ex rel. Cremonini vs. *Baton Rouge*, 1108.

Although a transcript contain neither note of evidence, statement of facts, bill of exceptions or assignment of error, the appeal will not be dismissed, if the clerk's certificate is complete and declares that it contains "all the testimony adduced." In such case, the court, without assignment, may inquire if there is error apparent on the face of the record.

Fazende & Seixas for Monition, 1145.

In an injunction suit to restrain a tax collector from proceeding with advertisement and sale of property for taxes, when judgment is rendered dissolving the injunction and ordering the tax collector to proceed with the sale to satisfy the taxes and naming the amount thereof, this last portion of the decree is not to be treated as a *moneyed judgment*, in estimating the amount of bond required for suspensive appeal.

State ex rel. Aymar vs. *Judge, etc.*, 1174.

Appeals will be dismissed where one bond only was furnished, under motions and orders of appeal from two judgments in two distinct and separate matters.

Successions of Clairteaux, 1178.

ATTACHMENT.

An attachment against a non-resident should not be dissolved because the petition covered by the affidavit alleges his residence to be in a named county, *Louisiana*, when the same petition refers to a petition filed by him, in which he represents himself as residing in the same county, *Indiana*. It is a clerical error, almost evident. It would be futile to dissolve an attachment in such a case, when, on proper correction, oath and bond, another would issue.

A judgment for a deposit, against which compensation could not be pleaded, can be attached by the depositary. The character of the claim has been merged into the judgment, and cannot be invoked to resist the seizure, in an action where compensation is not set up.

Citizens' Bank vs. *W. B. Hancock*, 41.

ATTACHMENT—*Continued.*

The validity of attachment process depends upon the state of facts existing at the time it was obtained. An attaching creditor may mistake his debtor's intentions, or those intentions may have been correctly divined on one day, and have been changed on the next by the fitful debtor. If the attaching creditor had good reason to believe that his debtor was about to dispose of his property to defraud his creditors, and attaches on that ground, and his process is properly served, it will not be invalidated because, in fact, the debtor afterwards absconded. Another creditor, afterwards attaching on the ground that the debtor had left the State permanently, will not take precedence of the first attachment.

S. L. Boyd vs. *Labranche, Sheriff*, 285.

The intent to defraud must exist to justify an attachment. It does not suffice that appearances indicate it.

L. C. Ferguson vs. *A. Chastant*, 339.

Where the proof shows that plaintiffs in attachment were authorized to entertain the fears declared in their petition, the execution of the writ can cause no damage. The verdict of a jury allowing such on a reconventional demand lacks foundation and must fall.

A. Baldwin & Co. vs. *Mumford, et al.*, 348.

In order to justify an attachment of his debtor's property, under the provisions of paragraphs 4 and 5 of Art. 240 of the Code of Practice, the attaching creditor must prove that the sale or disposition which the debtor is about to make of his property is with the intention of defrauding his creditors, or of giving an undue preference to some of them.

Proof that the debtor is offering his property for sale, in order to realize funds for the payment of all his debts and liabilities, accompanied by a declaration of such purpose to the attaching creditor himself, will not justify an attachment.

Lehman, Abraham & Co. vs. *McFarland & Dupré*, 624.

An attachment bond is fatally defective if it does not contain mention of the person, or of the property against which the writ issues. Its recitals should show unmistakably, and without the aid or need of extraneous proof, what or whose property is attached.

C. Kahn vs. *J. C. Ruse*, 725.

The court, before which the proceedings are instituted and under whose process property in its territorial jurisdiction may, on proper showing, attach other property of the absentee situated in the State, and in parishes not within the jurisdiction of the court.

Kahn & Bigart vs. *Sippili*, 1039.

ATTORNEY-AT-LAW.

An attorney-at-law employed to institute a suit for the revival of a judgment is not bound to cause the judicial mortgage to be reinscribed, unless he has contracted or been requested to do so, and is not liable in such case for damage or loss resulting from its peremption.

McKowan, Tutor, vs. *W. F. Kernan,* 331.

An attorney-at-law, who has been discharged by his client, cannot, against the will and orders of the latter, give bond and prosecute an appeal in his name. And an appeal so taken will be dismissed on motion of the client.

J. S. Ikerd vs. *Borland, Sheriff,* 337.

BANKS.

A settlement made by two banks through the Clearing House, in which checks are presented and exchanged, and a balance between them is struck, will be final and conclusive, if either fails to give notice of inability to meet the balance against it on the general adjustment, before the hour when banks usually pass checks to the credit of their depositors. The mutual credits thus given cannot be recalled by either one to the detriment of the other.

J. A. Blaffer et al. Commissioners, vs. *Louisiana National Bank,* 251.

BATTURE.

In suit to recover title or ownership to a batture or accretion formed in front of lands situated on the Mississippi river, the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's.

In sales of lots in the City of New Orleans fronting on the levee or river, if there exists a batture outside of the levee, susceptible of private ownership, the presumption is that the riparian owner and vendor does not convey his rights of alluvion, accretion or batture, unless the same be specially mentioned and described as being conveyed in the act of sale; and the heirs of a party holding the lot under a chain of titles, originating from such vendor, can lay no claim of ownership to such batture.

Mrs. M. E. Ferrière vs. *New Orleans,* 209.

A riparian owner expropriated, for purposes of public utility, of land fronting on a street, is not divested of his title to the batture in formation between the street and the water.

Batture property not necessary for public uses can be reduced to the private occupancy and absolute ownership of the proprietor.

F. A. Donovan, Wife, etc., vs. *New Orleans,* 461.

BILL OF EXCEPTION.

The power of determining or deciding whether the facts, as set out in a bill of exception, are true, must of necessity rest with the trial Judge. Any other rule would be impracticable, and would lead to endless dispute and inextricable confusion.

State ex rel. Hauk vs. *Judge, etc.*, 1190.

BONDS.

The holder of past due bonds and coupons of interest for several years, issued under an Act requiring the City annually to levy and collect a tax for the interest of each current year and a certain proportion of the principal, cannot, in the same action, obtain a judgment for the amount of his demand, and an order to compel the City officers to levy and collect a tax sufficient to pay the same. His monied judgment must be registered as required by Act 5 of 1870, as a condition precedent to other proceedings for satisfaction thereof.

S. Browne vs. *New Orleans*, 51.

In the absence even of suggestion to the contrary, the Court will assume that bonds, signed more than thirty years ago by the Governor of the State and other officers, were executed and issued in virtue of a power conferred by law and pursuant to its requirements.

The act of the State in purchasing her own bonds for the redemption of her debt stamps the bonds thus purchased with the insignia of validity, conformity to law, and good consideration.

Confusion did not ensue upon the State's purchase of her own bonds, and if it did, the State cannot avail herself of it, because she held them out to the world at the second sale as her valid obligations.

Cases will be decided on the pleadings of the parties and their omissions will not be supplied by the Court.

B. F. Carver vs. *Board of Liquidation*, 261.

The mandate of the Constitution, that "all property shall be taxed, etc.," is a substantial repetition of the language employed in the former Constitutions of 1864 and 1868. Under those Constitutions this mandate was always construed and executed as not applying to State or municipal bonds; and we are bound to assume that the Convention of 1879 employed the same language with a like intent.

In the absence of express language in the Constitution, or law subjecting such securities to taxation, the action of the assessors in listing them to be taxed is an attempt to impose a tax without legislative or constitutional authority.

State ex rel. DaPonte vs. *Assessors*, 651.

BONDS--*Continued.*

The defendants have authority in law to set up the plea of prescription as effectually as if the same had been raised by the City of New Orleans.

Bonds issued by the City of New Orleans are prescriptible by five years from their maturity.

The Premium Bond Act and the compliance by the City with its provisions, in preparing a list or *exhibit* of the then outstanding bonds, matured or not, do not constitute an acknowledgment and an interruption of prescription. Even if they did, five years had fully elapsed before the institution of this suit.

The right of action for payment of bonds held to be prescribed cannot be differentiated from one for an exchange of such for other bonds.

The decision in 32 An. 1250, (Conger vs. City) affirmed.

State ex rel. Rubera vs. *Board of Liquidation*, 753.

BROKERS.

A party who contracts with a broker in cotton for future delivery, with special reference to the rules of the Cotton Exchange in New Orleans, agrees thereby that his contract will be governed by such rules, and he will, therefore, be held to comply with the same.

Hence, if his contract is closed out under such rules, by reason of his broker's failure, and before its maturity, he must abide the consequences, and must make good the losses of his broker under the contract.

If the broker settles his liabilities with his creditors at the rate of fifty cents on the dollar, he cannot recover a greater proportion on the account of his principal. He is entitled to recover the amount actually disbursed by him and no more.

Williams, Pinckard & Co. vs. *J. Aroni*, 1115.

CERTIORARI.

In an application for a *certiorari*, wherein it is not charged that the Judge *arbitrarily* refused to admit legal evidence, this Court will not pass upon the correctness of his action. He had the legal power to admit, or reject evidence, and he has exercised it in the form pointed out by law.

The Supreme Court, in the exercise of its supervisory powers over inferior courts, will not transform itself into a court of appeal, for the revision of the rulings of such courts.

Where a court renders judgment in favor of a plaintiff and does not expressly pass upon a reconventional demand, the omission to do so is equivalent to a rejection of such demand.

CERTIORARI—*Continued.*

Where it is charged that a justice's court has illegally, but not arbitrarily, refused to issue its process on a call in warranty, the error, if any, was committed in the exercise of a legal discretion, and is not revisable in this Court in any form.

State ex rel. Unbehagen vs. *Justice, etc.*, 365.

CITATION.

Where a sheriff's return on a citation is irregular and void, the judgment rendered to confirm a default is a nullity and will be reversed on appeal.

Although the *return* be bad, the *service* may be good. In such a case the suit should not be dismissed, but should be remanded for further proceedings, at the cost of plaintiff and appellee in both Courts.

J. I. Adams & Co. vs. *F. A. Bazile*, 101.

COMMON CARRIER.

Where a bill of lading is pleaded as a contract and set out *in extenso* as part of plaintiff's petition, he will be held bound by all the provisions therein contained.

It is now the settled law of this country that carriers may, by express and special contract, limit their common law responsibility.

Under the contract in this case, being a through bill to San Francisco, Cal., the defendant's responsibility was expressly limited to the safe carriage of the goods over its own road and delivery to the connecting carrier, and to a guaranty of the through rate stipulated in the bill.

With reference to the guaranty, under the general law, as well as under the stipulation of the contract, defendant, as guarantor, was entitled to notice of failure of the delivering carrier to recognize the stipulated rate.

In absence of such notice, defendant is liable for no damages beyond the difference between the rate agreed and the rate demanded by the connecting carrier.

It was the duty of plaintiff to use all proper measures to protect himself from the injurious consequences of the wrongful act, and he can only recover such damages as could not thus have been prevented.

J. Tardos vs. *Chicago, St. Louis & New Orleans R. R. Co.*, 15.

Plaintiff shipped four carloads of mules from St. Louis to New Orleans, on the Iron Mountain Railroad and its connecting lines, consigned to Marx Levy. Defendant received the mules, as common carrier, at Mobile. Being unable to forward over its own line, owing to interruption, defendant forwarded the mules *via* Meridian and

COMMON CARRIER—*Continued.*

Jackson, in its own name and consigned to itself, received the mules in New Orleans, made delivery to the original consignee, and collected the freight and charges as due to itself, and in all respects dealt with the consignee as if it had been the actual carrier. By such conduct defendant made the lines, over which the mules were transported *pro hac vice*, its own, and subjected itself to the responsibilities of an actual carrier for damages suffered by the mules *en route*. Although defendant, on paying, may have its recourse against the actual carriers, it seems not to be a case for call in warranty, within the meaning of Art. 379, C. P.; and, at all events, there is failure of proof fixing the fault on the particular carrier called in warranty.

J. Levy vs. *L. & N. R. R. Co.*, 615.

A common carrier cannot seize goods for a debt due himself individually and wholly unconnected with the shipment, while they are in transit and for the safe carriage and delivery of which he has given a bill of lading. He cannot protect his private interests at the expense of his public duty as a carrier.

The carrier is in some sort a public officer, invested with power, burdened by duty, and held to reponsibility. He cannot by his own act prevent himself from doing his duty. He cannot place an obstacle in the way of performing his contract, and then plead that obstacle as an excuse for not performing it.

J. N. Pharr vs. *Collins et als.*, 939.

COMMUNITY OF ACQUETS AND GAINS.

It is now settled that the representative of a succession may sell community property to pay community debts, the interest of minors therein *non obstante*.

Where the separate funds of one spouse have been invested in property for the community, or otherwise, for its benefit, such spouse becomes a creditor of the community to that extent.

Where the husband becomes creditor in such manner, he is postponed to other creditors of the community; but, as against the wife and her heirs, his claim is perfect.

As such creditor, like any other creditor, he is entitled to have the community property sold, not only for his satisfaction, but for the necessary purpose of ascertaining the residue, if any, remaining in common.

Succession of L. Merrick, wife of L. J. Bright, 296.

The adjudicatee of real estate acquired in the name of a married wo-

COMMUNITY OF ACQUETS AND GAINS—*Continued.*

man, during the community between her and her husband, cannot be compelled to comply with the terms of the adjudication unless the presumption which makes the property a community asset has been effectually destroyed.

In such a case it is necessary for the married woman to show, not only that she had sufficient paraphernal funds, but also, that they were invested by her in the purchase of the property, and this, contradictorily with those who might have an interest to dispute her title.

The declaration of the origin of the price in the act of purchase and the admission of the husband of the truth of the facts thus stated, do not make the property paraphernal. They bind neither creditors nor forced heirs; the latter only to the extent of the disposable portion.

Although sometimes the title of married women to real estate may be perfect on its face, such is not the case where the property is purchased during the community. In such a case the married woman, of necessity, is driven to extraneous proof to establish her title, and the purchaser must submit to that evidence and accept the title, if unobjectionable.

Mrs. C. Bachino vs. *M. S. Coste*, 570.

The heirs of a deceased, who had disposed by testament of his share of the community, cannot recover a moneyed judgment against their mother and tutrix for community property adjudicated to her at the price of appraisement, and for revenue of community property realized during the minority of her children. Her right to receive their shares of the revenue and to administer their property rested exclusively on her tutorship, being deprived, under the terms of the will, of the right of usufruct of their share of the community. Under these circumstances, the only right of action of her children against her is for an account of tutorship.

For the revenue which she may realize from the succession property after the age of majority of her children, she is accountable only as a joint owner in possession of the whole property thus held in indivision.

H. F. Ludwig et al. vs. *Mrs. Weber et als.*, 579.

Where certain property is seized, under a judgment against a surviving widow, belonging to the community between her and her deceased husband, one of the heirs of the deceased cannot enjoin the sale beyond his interest in the property, although the succession of the deceased may be under administration and the community unsettled.

Offutt, Wife, vs. *Duson, Sheriff*, 986.

COMPENSATION.

Compensation cannot be validly set up in extinguishment of a claim for the price of commodities sold for *cash*, where possession of the same was obtained by an artifice or breach of trust.

The purchase price, payable *cash*, must be *paid* under the agreement.

Compensation rests essentially on good faith, and cannot take place against a claim for the restitution of a thing of which the owner has been unjustly deprived.

Article 1292, C. N., is identical with Article 2210 of our Code, and the authorities agree in that sense. Rulings in 6 An. 46, 207, 356; 7 An. 53; 28 An. 629, and other cases, affirmed.

Mutual National Bank vs. *Keenan & Slawson*, 1129.

CONFISCATION.

In a sale of property confiscated under the Act of Congress of July 17, 1862, all that could be sold was a right to the property seized, terminating with the life of the person for whose offense it had been seized.

Such proceedings and sale do not affect the rights of mortgage in favor of third persons on the property which goes to the government or to the purchaser *cum onere*.

A mortgagee under an act containing the pact "*de non alienando*" can proceed against the mortgagor, as though the latter had never been divested of his title.

Widow Avegno et al. vs. *Schmidt & Ziegler*, 585.

CONSTITUTIONAL LAW.

Revenue Act 4, Sec. 12, p. 90, 2d Ex. Sess. of 1881, is constitutional. Persons employed by a principal who has paid his license, and who do no business on their personal account, whose services, rendered within the State, are exclusively devoted to and enumerated by such principal, are "*clerks*" within the immunity of Article 206 of the Constitution, and therefore exempt from paying the license exacted from "travelling agents" under the said Act.

State ex rel. etc., vs. *C. Chapman*, 75.

Act of the General Assembly providing for a license for rice flumes inserted in the public levees is constitutional, and the parish ordinances under the provisions of said Act are legal and valid.

E. King vs. *Labranche, Tax Collector*, 305.

Warrants issued in favor of the University of Louisiana, of the Agricultural and Mechanical College, and of the University for the education of persons of color, under legislative appropriations made in obedience to Articles 230 and 231 of the Constitution, are entitled to be paid by preference over all other warrants drawn on the General Fund, with the exception of warrants issued in

CONSTITUTIONAL LAW—*Continued.*

favor of constitutional officers whose salaries are fixed by the Constitution, the latter having priority over all other warrants drawn on said fund.

State ex rel. University, etc., vs. *Burke, Treasurer*, 457.

The power granted by Art. 154 of the Constitution to the legislature, to prescribe that judicial advertisements in certain designated cities and parishes shall be made "in the French as well as in the English language," passed to the legislature untrammelled by the restrictions contained in Art. 48, relative to *local* or *special* laws.

Act 38 of 1880 is, therefore, not unconstitutional because of non-compliance with the requirements of Art. 48 of the Constitution.

The decision of the District Court, as to the extent to which warrants, baby bonds and school certificates may be used in the payment of State taxes due prior to 1879, is strictly correct.

H. Davidson vs. *Houston, Tax Collector*, 492.

The deputies designated by the Criminal Sheriff of the Parish of Orleans for duty at the Parish Prison, and as such entrusted with the legal custody of the prisoners therein confined, are *not employees of the Parish Prison*, within the meaning of Act No. 64 of the legislature of 1882, which requires that the salaries of such employees be paid by the City of New Orleans. These deputies must look to the fund created by Article 146 of the Constitution for the payment of their salaries. Courts of justice cannot overlook a clear and unambiguous constitutional provision for the purpose of ascertaining that the framers of the Constitution intended to make a different provision on the same subject matter, by an investigation into the journal of the convention.

The instrument published under the authority of the State, as the Constitution, is the organic law which all courts must expound, support and obey.

State ex rel. Brewster vs. *New Orleans*, 532.

A petition must contain allegations sufficient, if true, to entitle the party to the relief prayed.

Appropriations of money cannot now be made by the legislature for a longer time than two years. The appropriation of 1876 for pensions continued two years after the Constitution of 1879 took effect, but not longer.

State ex rel. Gras vs. *Auditor*, 537.

It having been held by the Supreme Court of the United States and by this Court, that Act No. 5 of 1870, in so far as it took away the judicial power to enforce the satisfaction of judgments by the writ of mandamus compelling the City of New Orleans to levy taxes,

CONSTITUTIONAL LAW—*Continued.*

within lawful limitations for that purpose, was unconstitutional as against prior contract creditors, that law stands as if it contained no such provision. The substantial and chief remedy existing at the date of the contract being thus left intact, that portion of the law which prohibits writs of *fi. fa.* against the City is a mere modification of the remedy within the legislative discretion and not of sufficient gravity to impair the obligations of the contract.

A. Rousseau vs. *New Orleans*, 557.

The Articles of the Constitution defining the original jurisdiction of inferior courts are not subject to the rigorous construction applicable to those defining the appellate jurisdiction of this Court, but must be construed with reference to Art. 11 of the Constitution, which guarantees adequate remedy in the courts for all legal rights. Hence, Articles 829 to 836, C. P., granting, among other things, the remedy of mandamus to compel "corporations established by law to make elections required by their charter," will not be held to be repealed by the Constitution, because the rights enforced thereby are not susceptible of pecuniary valuation; since the effect of such construction would be to leave the citizen without legal remedy to prevent violations of his legal right to vote.

Refusal to grant delay for filing application for new trial, when sufficient time has been allowed, does not constitute such nullity of proceeding as to vitiate them.

State ex rel. Donaldsonville vs. *Judge, etc.*, 637.

Act No. 9 of 1878, (Secs. 18 and 19) authorizing the assessment of taxable property omitted from rolls for previous years, is not in conflict with Article 110 of the Constitution of 1868, then in force, which prohibits *retroactive* legislation.

Such laws only as impair the obligation of contracts, or divest vested rights previously existing, or which create new rights or impose new obligations, not *in esse* before the passage of the law, partaking of the nature of *ex post facto* laws, fall under the ban of the constitutional inhibition.

The insertion of the words in the Constitution, forbidding retroactive legislation, has placed no greater restriction on the legislative power than had been put upon it by the Constitutions of 1845 and 1852.

Such constitutional restraint does not prevent the passage of remedial, healing or *curative* laws, designed to carry out a previously existing right, or to enforce an anterior obligation, otherwise barren of advantage. Particularly is such the case in matters of public concern, when the object in view is to have the burden of taxation equally shared by all upon whom it is imposed.

CONSTITUTIONAL LAW—*Continued.*

The Sections assailed are not retroactive, though retrospective. They refer to the past, but provide for a future remedy. Even were it otherwise, they are remedial or curative laws, not reached by the prohibition against retroactive legislation.

It is no valid objection to the levy and collection of a tax on the capital stock of a corporation omitted from an assessment roll, that it has since changed hands. Property liable to taxation cannot for such reason escape contribution.

The Act of 1882, No. 96, p. 128, which directs the assessment of stock to the shareholders is intended on its face to operate prospectively. It has no reference to assessments made prior to its adoption, is not *curative*, and can receive no application to the present case.

New Orleans vs. *R. R. Co.*, 679.

Act No. 98 of 1880, the object of which is to organize and put in motion the Criminal District Court for the Parish of Orleans, created by Article 130 of the Constitution, is not a *local* or *special law*, and does not fall under the ban of the Constitutional prohibition embodied in Article 48.

It has but one object and that object is expressed in its title. 33 An. 783, affirmed.

If part of Section 4 be unconstitutional, the remaining is not assailable and constitutes the Section.

State vs. *E. Dalon*, 1141.

CONTRACTS.

In the construction of an ambiguous contract, the safest mode is to ascertain the intention and meaning of the parties to the contract, as shown by their own acts, and by the manner in which they proceeded to the execution of the same.

Hence, when a party orders a cotton buyer in an inland cotton market to buy a quantity of cotton for him of a stipulated quality and of a stipulated price, and a portion of the order is filled by the buyer within a delay of eleven days, without objection as to delay on the part of the purchaser, the contract will be construed as contemplating a reasonable delay for its execution.

By consent of parties the cotton buyer may replace inferior cotton by other cotton of the required standard; and after such consent, the fact of the buyer's offer of inferior cotton in execution of orders, will not be considered as a violation on his part of the original contract.

T. H. Faries vs. *Ranger, Fatman & Co.*, 102.

The rule, that no damages can be recovered for the inexecution of a contract, when its non-performance was prevented by a fortuitous event or irresistible force, has two exceptions, one of which is when

CONTRACTS—*Continued.*

there has been some fault of the party contracting which preceded the fortuitous event, and without which the loss would not have happened; and the other when he has expressly or impliedly taken the risk of such event or force.

The non-performance of a contract for the delivery of corn is not excused by a freeze of a river, when it may be executed in another way than that first in the contemplation of the parties. If the freezing of a river be a fortuitous event, it is the duty of the party contracting to provide other means of transportation, and especially is this so when he is warned of the impending freeze, and knows the necessity of the party with whom he has contracted to have the corn delivered for reshipment.

When the circumstances show that the term was fixed in favor of the creditor, and the contract was made to enable him to fill another engagement by a stipulated time, the debtor or party contracting waits until the last day of the term at his peril, and takes the risk of weather changes which impede the execution of the contract in the manner least onerous to himself. A contract can be passively violated by not doing what was covenanted to be done at the time and in the manner implied from the nature of the contract.

Eugster & Co. vs. *J. West & Co.*, 119.

A contract couched in clear and unambiguous terms cannot be avoided as meaning a different agreement than the terms used import, and the letter of the contract must prevail, instead of invoking the remote intent of the parties.

J. McConnell vs. *New Orleans*, 273.

The failure of the City to pay cash each month for a contractor's work justifies him in abandoning his contract when such payment is expressly stipulated in it.

Expected profits from a contract to be realized in the future, which are dependent upon contingencies, cannot be included in a judgment for damages for its violation, and especially when both allegation and proof are general and vague.

A judgment against the City of New Orleans for the value of services rendered under a contract must be paid out of the revenues of the year for which the contract was made.

Thomas Bergen vs. *New Orleans*, 523.

Where a contract is made with the City Waterworks Company to procure water from the pipes and fire-plugs of the Company for a stipulated price, for the purpose of watering and sprinkling the streets, the party complying with his contract may prohibit the Company and its officers and employees from any interference with

CONTRACTS—*Continued.*

his business under the contract, and from any act to hinder or disturb him in using or procuring the required quantity from the water pipes, for the aforesaid purpose. The contract was a legal one and may be enforced.

P. Callery vs. *Water Works Co.*, 798.

A debtor's indebtedness cannot be divided without his consent, and hence, he cannot be held liable for an order on a part of his indebtedness, unless he consents to the appropriation, by his acceptance of the draft, or unless an obligation can be implied from the custom of trade, or flows from the nature of the contract between the parties.

Custom cannot prevail against a positive law.

The provisions of Act 134 of 1880 form part of the contract between railroad companies and other parties undertaking public works and their contractors. Hence, a railroad company cannot be held liable on an order for money drawn by one of its contractors, before the latter has made provisions for the payment of the wages due to his laborers, or to those of his sub-contractors, and when said company has refused to accept such order.

S. Meyer vs. *R. R. Co.*, 897.

In an action for the specific performance of an agreement to sell for cash a piece of immovable property, if it is shown that the defendant, who is a widow, had purchased the property in her own name during marriage, under the *régime* of the community, and had in good faith believed it to be her separate property, but discovered, after her agreement to sell the same, that the property belonged to the community, and that her husband's share of the same, which had accrued to her as his universal legatee, was affected with a general mortgage, resulting from a bond of tutorship, and if it appears that it is impossible for her to cancel said mortgage, there is a lawful excuse for the non-performance of her contract, as the same had been made by her through an error of law. The defendant is therefore released from the obligation of her contract.

J. H. Wilberding vs. *Widow Maher*, 1182.

CORPORATIONS.

The charter of a corporation can only be forfeited at the instance of the State.

Courts of this State are not without jurisdiction *ratione materiæ* over the subject matter of appointing receivers to corporations; but they should exercise such jurisdiction only in proper cases.

In a case where the charter of a corporation vests the liquidation in

CORPORATIONS—*Continued.*

the stockholders through commissioners elected by them, and where the stockholders consent to the appointment of receivers by the court, at the suit of creditors praying therefor, the judgment of the court appointing such receivers will not be disturbed on the appeal of creditors.

Where a court has appointed a person as receiver, who absents himself and fails to file the bond required under order of court, it lies within the discretion of the court to remove him and appoint another in his stead.

Louisiana Savings Bank, etc., 196.

A corporation is the custodian and trustee of the corporate funds, property and stock, for the stockholders; is bound to employ competent and faithful transfer agents; and responsible to the stockholders for any negligence or fraud of such agents, to their injury.

In case of illegal and unauthorized transfer of stock to a third person, the injured stockholder may contest the title of the transferree, contradictorily with both the latter and the corporation; but he is not confined to this remedy. It has been frequently held that he may sue the corporation alone for the value of his stock illegally transferred.

Under Art. 2997, the mandate to sell must be "express and special," which has been often held to mean the converse of *implied* and *general.*

The attempt to *imply* authority to sell from other acts of agent of a different character, done without authority and yet approved by principal, is in the very teeth of the Code. Nor do such facts operate as an *estoppel.*

Under the facts of this case the corporation permitted the transfer of plaintiff's property illegally and without authority from her, and is liable for its value and the dividends unlawfully divested.

Mrs. M. B. Morehouse vs. *Crescent Ins. Co.*, 238.

Where in a proceeding on the part of the State to have declared by judicial decree the forfeiture of the charter of a private corporation, on the ground of a fictitious issue of stock and insolvency, and the appointment of a liquidator is asked for, and an injunction obtained restraining the liquidators appointed by the Company from disposing of the property of the Company, or settling its affairs, a judgment dissolving the corporation, forfeiting its charter and recognizing the liquidators appointed by the Company and authorizing them to act and dissolving the injunction, will not be disturbed, in the absence of any complaint on the part of

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CORPORATIONS—*Continued.*

either creditors or stockholders, and the corporation is not in debt, and when it is manifest that the action of the Company's liquidators offer no just cause of complaint.

State vs. *Herdic Coach Co.*, 245.

Officers and directors of a corporation are mandataries, and as such liable to the corporation for injuries to it resulting from their breaches of duty.

They are likewise liable for trespasses, frauds, deceits and other wrongs which they may commit against third persons. Commissioners or receivers appointed to liquidate a corporation may assert all corporate rights against unfaithful directors. They, likewise, to a certain extent, are representatives of creditors, and may, in certain cases, vindicate the rights of the latter; but they can exercise no actions of this character except such as pertain to the creditors *ut universi*, and not those which pertain to them *ut singuli*.

Analyzing the various acts charged in the petition herein against the defendant officers and directors, many of them are found to import injury only to particular creditors or stockholders, whose rights the receivers cannot champion; others are set forth too vaguely and insufficiently to sustain the action.

Raymond et al., Commissioners, vs. *E. C. Palmer et al.*, 276.

The articles of consolidation between the N. O. Gas Light Co. and the Crescent City Gas Light Co., executed under the legislative authority conferred by Act 157 of 1874, operated a complete and perfect amalgamation, the effects of which were to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to transfer the property, rights and liabilities of each old Company to the new one.

The law authorized three-fifths of the stockholders of the original corporations to effect this consolidation, but it did not authorize them to place stock of non-participating stockholders on an inferior footing to their own, or to transfer their rights to a third person without their consent.

Plaintiff, as holder of stock in the Crescent City Gas Light Company, became entitled to the equivalent in stock of the new Company, secured by the articles of consolidation to his fellow-stockholders, and no payment or delivery to a third person, unauthorized by him, can be set up in satisfaction of his rights.

Inasmuch as plaintiff's claim is not for any particular shares of stock in the new corporation, he has nothing to do with such unauthor-

CORPORATIONS—*Continued.*

ized transferree, and need not make him a party to his suit. It is only where the claimant of particular shares of stock in a corporation encounters a rival claimant to ownership of the same, that the latter must be made a party.

J. W. Fee vs. *Gas Light Co.*, 413.

The judicial decree rendered in 1842, declaring the charter of the plaintiff forfeited, terminated its corporate existence.

The Act of 1847 laid upon the managers and directors of plaintiff the duty of requiring of the stockholders such annual payments as would accumulate a fund sufficient to meet the obligations of the State, restricting them only in this, that the equal instalments should run from one to seventeen years.

When the managers and directors accepted the terms offered them by the State in this Act, and levied a contribution of six dollars on each share of every stockholder as sufficient to meet the obligations of the State issued for this Association, a contract was thereby made by and between the State and the stockholders which neither can be permitted to violate.

The attempt of the State, by the Act of 1878, to impose a further contribution of forty dollars per share upon each stockholder, is a violation of this contract and cannot be enforced.

The annual contributions of six dollars per share are prescriptible in five years.

Consolidated Association, etc. vs. *G. J. Lord*, 425.

The plaintiff, the holder of certain bonds of the defendant Company, which had matured, accepted in renewal thereof new bonds of the Company having ten years to run, secured by mortgage on all the property and franchises of the Company, under an express contract that the Company would procure the passage of an act of the General Assembly at its next ensuing session thereafter, validating the mortgage given, so far as it included movable property, and this condition was the consideration for the extension granted. The plaintiff sues on the new bonds, alleging that they are exigible because of the failure of the Company to have the act passed. On exception that there was no cause of action, for the reason that the act in question would have been unconstitutional, and the condition was, therefore, impossible; *held*, that there was a cause of action, and a general act to effect the desired object would not be repugnant to the Constitution.

E. W. Burbank vs. *Gas Light Company*, 444.

In this State there are no general statutes compelling railroad companies to fence in their tracks. Hence, in a suit against a railroad

CORPORATIONS—*Continued.*

corporation for the recovery of the value of stock killed or otherwise destroyed by its trains and employees, the plaintiff must make his case certain, as in other suits for damages; and he must allege and prove that the injury to his property was the result of culpable negligence and carelessness on the part of the corporation or of its employees.

J. A. Stevenson vs. *N. O. Pacific R. R. Co.*, 498.

In the particular case provided for by Section 284, R. S., an action for forfeiture and liquidation of a Free Bank may be instituted by a creditor and without the intervention of the Attorney General.

The allegations of the petition herein, even if not of themselves sufficient to sustain the demand, are enlarged by the admissions contained in the answer of defendant, which are to be treated as if the same facts had been established by evidence offered and received without objection. These facts establish a state of legal insolvency and of violation of the conditions of the act sufficient to support the decree.

State ex rel. Wogan vs. *Mechanics' & Traders' Bank*, 562.

The enumeration of the various works of public utility and advantage, for which corporations were authorized in Section 683, Revised Statutes, was exemplary and not exhaustive, and all similar and analagous enterprises were covered by the concluding words, "and generally all works of public utility and advantage."

The business of establishing a wharfboat and a steam elevator at the river bank of the port of Monroe, for the convenience of river carriers and of all shippers and receivers of freight, and of carrying on, through such instrumentalities, a receiving, forwarding and storage business, falls within the purview of the law.

The members of such a corporation are not liable to be sued, as individuals, for the corporate debts.

R. P. Glen vs. *Breard et al.*, 875.

COURTS.

A Judge cannot change the minutes of his court to correct the errors of counsel; but the power is inherent in every court to correct its minutes, in chambers as well as in term, so as to make them conform to the truth.

In criminal cases, when the correction is applied for in chambers by the State, notice must be given the defendant, and *vice versa*, and in civil causes, when the change affects the rights of parties to suits, and the application comes from one of them in chambers, notice must be given the other.

Picard & Weil vs. *L. Privol*, 370.

COURTS--*Continued.*

The right of one who is not a mere trespasser, who acts under color of right as the Judge of a court, cannot be attacked collaterally. Direct and regular proceedings by the State are necessary.

State vs. *J. Williams*, 742.

The Supreme Court has no power, and will never attempt, to interfere with the discretion of District Judges in their manner of controlling their courts, or of enforcing rules of decorum or propriety therein.

Hence, the Court will not entertain a complaint that the District Judge erroneously refused to stop an attorney in the course of his argument, on the ground that his argument was unfair, improper or unbecoming.

State vs. *Duck et al.*, 764.

A Judge has a right to change the terms of the court over which he presides. He was not deprived of such authority by the Act No. 7 of 1880, which only directed how the orders fixing the terms should be made and published.

Where a term of court has been ordered to be held by the Judge under a general order fixing the terms, and subsequently he prepares another order, in which it is announced that it will not be held, and hands such order to the clerk with instructions not to record it, the Judge can, within a short time after, and before any action is taken under it, withdraw or erase the order, and the first order for the holding of the term will be in full force, and the term held under it, a legal one.

Where a change is made in the terms, it is not necessary that a notice of such change should precede the order making it, but that notice for the prescribed time should be published before the arrival or holding of the term.

Where, owing to some obstacle, the grand jury cannot be empanelled on the first day of the term, it may be empanelled on the second day.

State vs. *S. Dillard*, 1049.

CRIMINAL LAW.

APPEAL.

Where the transcript is not filed on the return day, or within the legal delay following it, the Court is impotent to grant an extension of time to file it.

The failure to do so in this case is of defendant's procurement. Sentenced to death, he made his escape before the return day, and thus the transcript was not even prepared. Captured long after

CRIMINAL LAW—*Continued.*

the last judicial day had thus elapsed, he must stand the irrevocable consequences of his rashness.

State vs. *R. Butler*, 392.

Where, in a criminal case, no objection is made by the accused or his counsel to the charge delivered in writing when given, and no bill of exceptions taken thereto, and there is no proper assignment of errors, and complaint is for the first time made in this Court with respect thereto in the brief of counsel, the matter will not be reviewed by this Court, nor the sentence disturbed.

State vs. *J. Sheard et al.*, 543.

An assignment of errors is not the proper mode of bringing up for review alleged misdirections of the lower court to the jury. Bills of exception should be taken to such portions of the charge as are objected to, or to the refusal to charge as requested, and when it is claimed that the particular facts in evidence justify or require such charge, the facts should be stated in the bill to which the charge is claimed to be pertinent.

State vs. *Riculfi et al.*, 770.

When the ruling of the trial court striking from the record a plea of *autrefois convict* has been held to have been erroneous, we cannot consider the merits of the plea which have never been passed on below, but are compelled to reverse the judgment and remand the case to be proceeded with under the reinstated plea.

State vs. *W. Bille*, 851.

The State can appeal from a judgment quashing an indictment before trial, when the offence charged is punishable capitally or at hard labor.

State vs. *A. Humphries*, 966.

EVIDENCE.

There is no authority under the laws of Louisiana or the Common law, to empower a court to issue a commission to take the testimony of witnesses residing in another State, in a criminal cause.

A new trial will not be granted with the view to introduce newly discovered evidence for the purpose of impeaching the testimony of a witness in a criminal case. Cumulative evidence cannot be considered as a sufficient ground for a new trial.

The newly discovered evidence, made the basis of the motion for a new trial, must be shown to be material and of such a nature as to change the result of the trial. The presence in court of the accused is not indispensable during the trial and disposition of

CRIMINAL LAW—*Continued.*

motions for continuance, to quash the *venire* or other proceedings of like insignificant character, not material or essential parts of the trial of the guilt or innocence of the accused.

State vs. James Fahey, 9.

Evidence as to the dangerous or vicious character of deceased is not admissible unless the proof previously administered has laid the legal foundation for the admission thereof, which, under the statements of facts made by the Judge in the bill of exceptions, has not been done in this case.

State vs. *A. Claude et al.*, 71.

In case of a conspiracy to commit a crime after such conspiracy is proved, a declaration of one of the conspirators made even out of the hearing of the other, relating to the commission of the crime, is admissible against him, but not if made after the common purpose has been consummated or abandoned. And this rule is not varied by the fact that after the commission of the offense and the arrest of the offenders, they have entered into a new conspiracy to manufacture or influence evidence favorably to themselves at the approaching trial, and the declaration of one of the conspirators in question is made whilst pursuing the purpose of the last conspiracy.

State vs. *A. Buchanan*, 89.

In a prosecution for forgery, the person whose name is alleged to have been forged is a competent witness to prove the forgery. 1 Martin, p. 214, reaffirmed.

Proof that the accused, with knowledge of the character of the instrument, attempted to pass it in the parish where the charge is brought, is sufficient proof of the venue, even where the instrument does not show on its face that it was executed in that parish.

State vs. *W. Morgan*, 293.

Though an accused be under arrest, his confession to one of those arresting and guarding him may be admitted against him where it was not induced by promises or threats, but appears free and voluntary.

State vs. *H. Revells*, 302.

Where the accused voluntarily offers evidence to prove his good character and thus opens the door for contradiction, it is legitimate for the State to tender, in rebuttal, proof of his bad reputation, the more so when the inquiry is upon cross-examination of witnesses of the defense.

District Judges are vested with a legal, not an arbitrary discretion. When they exercise such and objection is made, they should state

CRIMINAL LAW—*Continued.*

all the reasons which have induced their rulings. Facts often transpire in the presence, or are to the knowledge of Judges, the existence of which is not established by the record. Proper information would, if known, enlighten the court and enable it to test the correctness of such rulings. In the absence of such statement, those facts cannot be divined by the appellate court, which, in default, is bound to assume that the grounds stated are the only ones.

Bills of exceptions will not be considered when, even if well taken, the accused would not be benefitted thereby.

State vs. *M. Farrer*, 315.

All persons present aiding and abetting in the commission of a felony are principals, and must be indicted as such. Any testimony, therefore, to show guilt of the prisoner, whether that guilt consisted in shooting, or in being present aiding and abetting the shooting, is admissible.

State vs. *H. G. Blackman*, 483.

Where the Judge charged "that the State was bound to introduce the best evidence attainable," but refused to add that "the rule applies to the examination and analysis of the alleged blood stains," there was no error, because the first was sufficiently comprehensive to include all the evidence, and that refused, involved the assumption of the fact of an examination of blood stains and, therefore, trenched upon the facts.

Where there is no written charge of the Judge to the jury in the record, and no exception was made thereto when delivered, and no request made for a charge upon a certain point, complaint of the omission to give the charge not asked for cannot be considered.

State vs. *R. Mangrum*, 619.

The charge that the accused is presumed innocent, until the contrary is proven beyond a reasonable doubt, and that he is entitled to the benefit of a doubt, if it be substantial, is good law, and sufficiently liberal to the accused.

State vs. *Duck et al.*, 764.

Where a charge asked to be given to the jury is couched in terms calculated to tell them which of the witnesses heard they should in preference believe, and the charge requires qualification, limitation or explanation, the refusal of the Judge to give it will not be disturbed.

Giving such charge would be to trench on the facts, which the Judge is forbidden from doing. The appreciation of the facts and of the

CRIMINAL LAW—*Continued.*

credibility of witnesses is exclusively within the province of the jury.

State vs. *P. Jackson*, 769.

A Judge not only may, but should refuse to charge an abstract legal proposition which has no bearing upon the case on trial, whether the proposition be correct or incorrect, or whether it be correct in part and incorrect in part. Even if it requires qualification, limitation or explanation, it may be refused.

A bill of exceptions should contain a statement of the facts which present the question of law, and the Judge should not sign a bill containing a statement of facts at variance with his own. He has the power and the right to correct an erroneous statement in the bill.

Character is an important element in a criminal case when evidence of it is admissible, and it must be considered in connection with and as a part of the whole testimony, and due weight given to it, but it cannot destroy conclusive evidence of guilt.

State vs. *Riculfi et al.*, 770.

Although a confession made by one of two joint defendants might not be admissible as a confession against the other until proof of conspiracy, yet when made in the other's presence and implicating him and not denied by him, it may go in as a tacit admission by the latter, in absence of objection on the ground that he was under arrest on the charge at the time, and, therefore, had the right to be silent.

Proof by a witness, of subsequent statements made to him by the co-defendant, is hearsay and properly excluded.

State vs. *J. Johnson et al.*, 842.

Before a witness can be discredited on the ground of having made a contradictory statement to that made on the trial, such mode of discrediting cannot be resorted to, unless the proper foundation is first laid by asking the witness whether he had made such statement, giving the particulars of the time, place or circumstances under which it was made. Where this cannot be done, because the witness sought to be discredited is dead, the proof of such contradictory statement will not be admitted.

State vs. *S. Johnson*, 871.

Admissions and confessions may be implied from the acquiescence of the defendant in the statements of others made in his presence, when the circumstances are such as afford him an opportunity to act or speak, and would naturally call for some action or reply from a person similarly situated; hence, in this case, where it is not

CRIMINAL LAW—*Continued.*

shown that the accused was in actual custody when accused of the commission of a crime, the following charge is not only correct, but extremely liberal to the accused: "standing silent when accused out of court is not presumed as a confession of guilt, but remaining silent when accused of the commission of a crime is a circumstance which, like others, must be considered and weighed by the jury."

State vs. *J. Munston*, 888.

A trial Judge rightfully refuses a question to be put to a witness under cross-examination, to impeach his veracity, unless a foundation has been previously laid to that end. Such witness cannot, in a case of embezzlement, be asked to examine accounts other than those of the accused. Error in such accounts would not prove error in that of the prisoner.

A trial Judge cannot be asked to charge the jury so as to express an opinion as to what facts have been proved. It lies within the exclusive province of the jury to weigh the evidence adduced on the trial.

The failure of an accused to pay over the money which he is charged of having embezzled, if unexplained, does not of itself raise a presumption of a felonious appropriation sufficient to convict.

A bill of exception taken to the overruling of a motion for a new trial, which is levelled exclusively at the verdict, because contrary to the evidence, is devoid of merit, as it presents no question of law which this Court can consider.

State vs. *B. O'Kean*, 901.

Declarations of accused made an hour after the time, and a mile from the place of the homicide, are not admissible as part of *res gestæ*.

The rule that, when confessions or declarations of accused are received on behalf of the State, they must go in all together, applies only to such confessions and statements as are made at one time or in some connection with each other. The admission of confessions of accused does not justify the reception of contrary, self-serving declarations made six weeks previously.

State vs. *W. Johnson*, 968.

Where the trial Judge is requested to give a special charge to the jury, his refusal to do so, although the charge asked is not objectionable, is not error if the charge has been substantially covered by that already delivered by the Judge.

The character of the deceased as a turbulent man may be looked into in determining the amount of provocation, when it tends, in connection with proof of an overt act on the part of the deceased, to

CRIMINAL LAW—*Continued.*

produce in the mind of the slayer a reasonable belief of imminent danger.

The right of self-defence does not depend exclusively upon the reality or imminency of the danger apprehended, but whether at the time the accused had reasonable ground to believe himself in danger of losing his life or of great bodily harm, and had no other apparent means of escape than to take the life of his adversary, and whether such grounds existed, is a fact for the determination of the jury.

The trial Judge is not bound to charge on a particular point of law, although the charge may announce a correct legal principle, where, in the exercise of a sound discretion, he is satisfied that such charge is not applicable to the case.

Evidence of the good character of the accused is admissible in his behalf, and is not to be limited in its effect to merely doubtful cases, but to be weighed as any other fact in the case, and as one tending in a greater or less degree to establish the innocence of the accused.

State vs. *Garig et al.*, 970.

Testimony offered to show that a co-defendant, in a case of larceny, and a fugitive from justice, called upon and induced the prisoner to assist him to go after the property stolen, is not *hearsay*, but original evidence. The facts sought to be proved form part of the *res gestæ*, and were susceptible of legal proof.

State vs. *Chretien*, 1031.

An accomplice may be called as a witness for the State, even when jointly indicted with said accused and before his own conviction or acquittal, where the trials are separate.

The Judge is not bound to give a charge, although it may be correct as an abstract principle of law, where, in his belief, there is no fact proved to which it is pertinent.

State vs. *L. Hamilton*, 1043.

Oral testimony is admissible to prove the contents of a dying declaration, *first* proved to have been lost.

State vs. *Rector*, 1098.

The fact that one witness is not allowed to prove a confession made to him by an accused, because inducements had been held out by that witness, will not be good ground to exclude a confession made by the same accused a short time thereafter, to another witness, who had made no threats or held out no inducements in order to draw out the confession.

CRIMINAL LAW—*Continued.*

In cross-examining a witness for the defense, the State will be allowed to propound questions growing out of facts and circumstances stated in his direct examination by the witness, even when it appears that the witness had been introduced for a different and exclusive purpose.

State vs. *R. Stuart*, 1015.

FORGERY.

It is not necessary, to support a prosecution for forgery or falsely uttering, that the instrument purporting to be forged should be perfect in its resemblance to the kind it was designed to represent. It is sufficient that it was calculated to deceive.

Thus an order addressed to a merchant in these words: "Please let George have sixteen dollars worth, and charge the same to Mr. George Garrett;" held sufficient.

State vs. *R. Ferguson*, 1042.

INDICTMENT.

Where a party is indicted for murder, and convicted of manslaughter, the indictment, if filed within the year the killing took place, interrupts prescription for the latter offense.

State vs. *M. Diskin*, 46.

An indictment is not vicious for duplicity because two distinct offences are charged therein, provided they be in separate counts, nor is it even necessary that they be of the same class of offences if charged in separate counts.

The Judge can direct a jury to reconsider their verdict, before it is recorded, if satisfied that a palpable mistake has been made, provided in so doing there is no attempt to influence the jury, or to direct them beyond aiding them to put in form what they have found.

A conviction of a less offence than that charged in the indictment, both being of the same generic class, is expressly authorized by our law. And therefore a conviction of inflicting a wound less than mayhem with a dangerous weapon or with intent to kill, denounced as a crime by Sec. 974, Rev. Stats., is legal and regular under an indictment for cutting with a dangerous weapon with intent to commit murder, under Sec. 791.

State vs. *L. Gilkie*, 53.

Where a party is indicted as E. Buchanan, is arraigned and pleads as Amos Buchanan, which is his true name, the State during the progress of the trial can amend the indictment by setting out the true name.

State vs. *A. Buchanan*, 89.

CRIMINAL LAW—*Continued.*

An instrument which reads as follows: "December 23d, 1882. Bleas let James Johnson have ten dollars worth of dry goods, $10, and send the Bill, J. DILLINGER," which is transcribed in full in an indictment for forgery, supported by proper averments, is an order sufficient to sustain a prosecution and to justify a verdict.

A clerical error in writing a name in an indictment cannot be invoked as vitiating the proceeding. State vs. Given, 32 An. 782.

State vs. *W. Morgan*, 293.

When the venue has been changed, the indictment must be transmitted to the court to which the cause has been removed, and does not need to have stamped upon it the seal of the court from which it comes. If a trial is had and the judgment is set aside, the indictment remains in the court where the trial was had, and no more needs the seal of either court for the second trial than for the first. The new forum stands in the place of that in which the indictment was found, and as it would not need a seal if the trial had taken place in the latter court, so it does not in the other. The minutes of the court, its orders, etc., cannot be sent up, and therefore must be copied, and the copy attested by a seal.

Counsel should not be permitted to re-argue the question after the court has decided it. Their remedy is by exception to the ruling.

State vs. *H. J. Brown*, 340.

An indictment for burglary is not bad for duplicity because it charges the offense of breaking and entering with intent to steal and rob, and that of breaking and entering with intent to kill and murder. 34 An. 48; 30 An. 487, reaffirmed.

State vs. *J. Conway*, 350.

Under an indictment for shooting with intent to murder, a verdict of "inflicting with a dangerous weapon a wound less than mayhem," is fatally variant.

The two offenses are separate and distinct crimes which could not be joined in the same count of an indictment.

The offense found is not necessarily embraced within that charged.

State vs. *A. R. Murdoch*, 729.

Section 119, Revised Statutes, is a penal but not a criminal statute.

An attorney-at-law falls within the category of persons named in Sec. 905, Rev. Stats., and is sufficiently described in an indictment as an attorney.

An attorney who has wrongfully used or disposed of money collected for his principal may be convicted of embezzlement, even though he acknowledged its receipt.

State vs. *R. L. Belden*, 823.

CRIMINAL LAW—*Continued.*

An indictment charging that the accused with a dangerous weapon did *make an assault* upon the person of A, and did feloniously inflict a wound less than mayhem, is evidently framed under Sec. 974 of the R. S.

It is not amenable to the charge of duplicity, for containing the words: "*did make an assault,*" found in the preceding Section 973.

Assault is an essential element or ingredient of the offense charged. There can be no battery, no murder, no rape, no wounding, unless an assault be first committed.

The use of the words did not change the nature of the offense charged, and was legitimate and authorized.

State vs. *W. Taylor*, 835.

Indictment concluding with the words "against the peace and dignity of the State," complies with requirement of Art. 86 of the Constitution.

As to distinction between day and night, time is of essence of the crime of burglary, but not as to date of week, month or year; and the court did not err in allowing amendment of indictment as to such date, under § 1047, Rev. Stat.

State vs. *J. Johnson et al.*, 842.

An indictment for forgery containing the purport or tenor of the instrument said to have been forged, and setting forth the words of such instrument, can be legally amended during the trial, by substituting the word *oblige* to the word *charge* at the conclusion thereof.

The variance was not material and could not prejudice the defense.

The correction was trivial and left the sound and sense substantially the same.

State vs. *D. Sullivan*, 844.

An indictment framed in compliance with the provisions of Section 1048, Revised Statutes, need not state the means by which death was inflicted, and need not comply with the common law forms of indictments. State vs. Bartley, 34 An. 147; State vs. Granville, 34 An. 1088, reaffirmed.

State vs. *J. Munston*, 888.

Where the property stolen was a piece of meat and was charged in the indictment to be the property of A, and the proof was that B, who was the seller of it, had cut it off a larger piece and had put it on the counter, and A paid for it, and it was stolen before A took it up; *held*, the delivery was complete; the property was rightfully laid in A, and the conviction was legal.

State vs. *J. Robinson*, 964.

Sec. 790, Rev. Stats., denounces as a crime the shooting, etc., any person

CRIMINAL LAW--*Continued.*

with murderous intent, whether done while lying in wait, or while perpetrating arson, etc. The circumstances under which the shooting was done may be either those of lying in wait, or perpetrating other named crimes, and an indictment charging the shooting under either will be good.

An error in date of the term of court at which the indictment was found may be corrected with leave of the court.

The insertion in the indictment of the words "with a dangerous weapon" is not essential, where all the ingredients of the crime that are set out, necessarily imply the use of a dangerous weapon.

State vs. *A. Humphries*, 766.

The Judge does not err in refusing to give to the jury a charge, however legal, which is evidently covered by previous charges. Such charge is unnecessary.

Sentence can be legally passed on a conviction of guilt of *larceny*, although the indictment was for *burglary* and *larceny* and the verdict was on *both*, and the indictment, fatally defective on the count for *burglary*, was, with the verdict, to that extent quashed on a motion in arrest.

The indictment and verdict on the charge of *larceny*, which is an offense not necessarily connected, remained perfect and were a good foundation for the sentence.

State vs. *T. Brown*, 1058.

The authentication of the clerk to the copy of an indictment extends to the body of the instrument, and to the indorsement thereon, where both are in the hands of the attesting deputy.

State vs. *Rector*, 1098.

An amendment allowed during trial, in a case of rape, substituting a different name to that of the person charged as having been ravished, with the object of substituting another person, affects the substance of the indictment and is not permissible under Sec. 1047, R. S. The District Court was right after verdict to quash the same.

State vs. *M. Morgan*, 1139.

A trial Judge is justified in refusing to give to the jury special charges which, although legal and pertinent, are amply covered by charges previously given.

It is unnecessary, in an indictment under Sec. 832, R. S., charging, in the words of the Statute, that the accused has feloniously received the object which had been feloniously stolen, he well knowing that the same had been so feloniously stolen and taken, to charge specially that the offense was committed with intent to defraud

CRIMINAL LAW—*Continued.*

the owner of the property, or some person, or for the purpose of felonious or wicked gain.

State vs. *F. Hartleb*, 1180.

INFORMATION.

In an information for an assault with a dangerous weapon with intent to murder, the words "make an assault," are not sacramental. The word "commit" may be used instead of "make," where the facts are averred that make up the offense charged. The word "commit," in such connection, does not merely declare a conclusion or opinion.

Where the charge of the assault is followed by the words, "with intent *in so doing*, feloniously, wilfully and of his malice aforethought, to kill and murder," the words "in so doing," supply the place of "then and there," as they sufficiently show that the intent charged accompanied the assault.

State R. Murphy, 622.

An information that charges, "that A. B. at 8 o'clock in the night time with the felonious intent, the dwelling house of one C. D. feloniously then and there to set fire to and burn, feloniously and burglariously then and there did break and enter the said dwelling house," is not obnoxious to the charge of duplicity, as it charges but one offense, and that offense declared by Sec. 851, Rev. Stat.

State M. Ely et al., 895.

JURY.

A clerk of a District Court, elected in December, 1879, who took an oath of office as clerk on the 21st of January, 1880, and who took an oath as *ex-officio* jury commissioner on March 6th, 1880, complied with the requirements of the Constitution, of the law and of jurisprudence; and was thus legally qualified as far as the prescribed oath was concerned as a jury commissioner. No other oath was required of him on entering into his office on the 1st Monday of April, 1880.

State vs. *James Fahey*, 9.

Act 44 of 1877, relative to jury commissioners, was not repealed by the Constitution, with which it was not inconsistent. If Act 54 of 1880, on the same subject, was not passed in furtherance of Article 116 of the Constitution, the former Act was in force at the time of the trial of this case. If it was, as it continued Act No. 44, under which the commissioners were appointed, there is no cause of complaint.

CRIMINAL LAW—*Continued.*

It is no valid objection that the selection of jurors was not made from all *qualified* voters, but from the *registered* voters, when it is not shown that the list of the latter did not contain the names of all the former.

That the accused was manacled, while a motion for a new trial was being tried, is no ground for a motion in arrest of judgment, which reaches only intrinsic errors patent on the face of the record and which vitiate the proceedings.

A proceeding to falsify the judgment can be entertained on a proper showing. That a petit juror was a member of the grand jury who found the bill, should be urged by challenge at the proper time, and cannot avail on a motion in arrest.

State vs. *Frank Thomas*, 24.

Under the provisions of Act 44 of 1877, the District Judge has the discretionary power to order the drawing of additional jurors to serve as regular or as talesman jurors; and under the same authority he has the power to discharge the jurors so drawn, if he thinks that their services are no longer necessary.

State vs. *Robert West*, 28.

Where a juror, when examined on his *voir dire*, declares that he has formed no opinion touching the guilt of the accused, that he knows nothing of the case, his competency thus shown will not be affected by proof of an inconsiderate remark, uttered a short time before he was called as a juror, and which, without explanation, might seem to denote a bias against the accused.

State vs. *M. Diskin*, 46.

Art. 117 of the Constitution and Act 77 of 1880, contain nothing inconsistent with previously existing laws authorizing District Judges to call special jury terms; and the latter, therefore, are not repealed.

Where, in calling such a term, the Judge has complied with all the duties imposed on him by the law, the partial failure by the clerk to perform all the duties imposed on him, with reference to giving notice, will not invalidate the term, under the circumstances disclosed in this case.

Where the Judge was appointed to fill a vacancy during the recess of the senate, and then appoints jury commissioners, his subsequent confirmation by the senate and taking a new oath, does not create such a new term as vacates the offices of the jury commissioners and requires a new appointment.

CRIMINAL LAW—*Continued.*

Act 44 of 1877 conferring on clerks the *ex-officio* duty of acting as jury commissioners, is not repealed by Art. 122 of the Constitution, or Acts 106 of 1880 and 43 of 1882.

State vs. *A. Claude et al.*, 71.

The Jury Act of 1877 is in force, and was in no manner repealed or affected by the new Constitution.

A motion in arrest, on the ground that there is no law for the selection and composition of juries by reason of the alleged repeal of all statutes on that subject, is in substance a challenge to the array, and must be made before pleading to the indictment. The objection comes too late in a motion for arrest of judgment.

State vs. *C. White*, 96.

Where, after a criminal case is taken up for trial and the jury is being impanelled, the regular venire is exhausted, the trial Judge is authorized to order the summoning of talesmen from bystanders in the courthouse and in proximity thereto. And where the sheriff summons a talesman from the bystanders in the vicinity of the courthouse and nearest thereto after the court has adjourned, on the day and on the next morning thereafter, before the court resumes its session, the summons is regular, and the juror, if not otherwise disqualified, competent.

Where the juror, examined on his *voir dire*, says he has no fixed opinion touching the guilt or innocence of the accused, and no bias or prejudice against him, he is competent, though he may previously have had an opinion or impression on the subject, where it appears that such opinion or impression will yield to the evidence in the case.

State vs. *H. Revells*, 302.

Attachments against absent jurors cannot be required to be issued where there is a sufficient number of jurors present to form the panel, or when there are only four absent, and they reside twenty-five miles from the courthouse, or when the motion is not made before going to trial.

State vs. *M. Farrer*, 315.

Juror who states, on his *voir dire*, that he has formed and expressed an opinion as to guilt or innocence of the accused, which opinion was based on statements made by witnesses in the case, but that this opinion would yield to sworn evidence, and would have no influence on him in the jury box, and that he was free of bias or prejudice against or in favor of the accused, whom he would try impartially, is a competent juror.

State vs. *R. Dugay*, 327.

CRIMINAL LAW—*Continued.*

The State has the right to ascertain the fact of a juror's fitness and impartiality by other than the stereotyped questions on the *voir dire*, and may interrogate the juror in such manner and form as will best serve to show whether the juror has been subjected, knowingly or not, to influences that would unfit him for the discharge of his function.

State vs. *H. J. Brown*, 340.

Under Act No. 44 of 1877, regulating the manner of drawing juries in this State, the clerk is the most responsible, and is an essential and indispensable member of the jury commission. Hence, no jury can be legally drawn during his absence and without his co-operation.

State vs. *J. Conway*, 350.

The minutes of court do not contain properly the recital of service of the list of jurors on the prisoner, and therefore an objection, not that there was no service, but that the minutes do not show it, is untenable. The sheriff's return is the place where such service is shown.

State vs. *H. G. Blackman*, 483,

Where jury commissioners accept a number of names found in the venire box, selected by their predecessors, after due examination into their competency and qualifications as jurors, and add to these names others to make up the prescribed number, the law is substantially complied with, and the drawing and the selection of the venire is not vitiated.

Where a juror has been examined on his *voir dire* by counsel for the State and the accused, and the Judge has ruled that he was competent, it is too late for the counsel for the accused to reopen the examination upon the matter of his competency; and the further fact that the person objected to did not serve on the jury, leaves the accused without the least ground of complaint.

State vs. *R. Mangrum*, 619.

The trial Judge has the right to take judicial notice of the existence before his court of a prosecution for an infamous crime against one called on to serve as a juror, and is authorized to exclude him from service.

State vs. *P. Jackson*, 769.

Where three hundred names of jurors have been put in the box from which the jury has been drawn for the first weeks of the term, it is not necessary to revise the list and put in more names to draw a jury for a later week of the same term.

The list of jurors served on the prisoner need not be a copy of the

CRIMINAL LAW—*Continued.*

proces verbal of the drawing. It is only needful that the list be complete and correct.

The omission of the word "foreman" from the signature on the back of an indictment is not fatal. It is sufficient that the foreman has signed his name to the finding of the jury, "a true bill," without mentioning his capacity.

The objection that a juror is an unnaturalized foreigner must be made as a challenge, when he is presented, and cannot be urged in arrest of judgment.

State vs. *C. Sopher*, 976.

If it appears in a criminal case, from the indictment or other portions of the record, that the grand jury had been duly empanelled and sworn, and otherwise legally organized, it is sufficient. The minutes of the court are not the exclusive mode of proving such facts.

State vs. *R. Stuart*, 1015.

An objection made to the time of drawing the jury, without charging fraud or wrong, as required by Section 10 of Act 44 of 1877, cannot be considered.

The Statute, R. S. 992, does not expressly say: that the list of jurors to be served on the accused shall be attested by the clerk under his official signature. Where the list issued, and admitted to have been served, is a newspaper clipping, which bears the impress of the seal of the court, and which ends with the words: *a true copy*, followed by the printed name of the deputy clerk; where no complaint is made that the list is otherwise defective; where the list is truly an exact copy of the original, and where there is no injury shown, substantial compliance with the law cannot be denied.

The looseness with which the documents were issued by the clerk is censurable.

State vs. *Rector*, 1098.

Mere temporary absence from the State, during the year prior to the service of a juror, if without the intention of changing citizenship or abandoning residence, will not destroy the qualifications of a juror.

State vs. *J. Alexander*, 1100.

LARCENY.

In petty larceny there can be no accessory. Those who in grand larceny would be accessories before the fact, under our statute are principals in petty larceny. Hence, the following charge to the jury in a case of petty larceny is correct: When a person hires another to commit a theft, and for that reason the theft is committed by the person thus hired, and the person hiring for the com-

CRIMINAL LAW—*Continued.*

mission thereof enjoys the benefit of the theft, such person is guilty of larceny, although absent at the time the theft is committed.

State vs. *J. Henderson et al.*, 45.

MOTION IN ARREST.

A motion in arrest of judgment is not the proper proceeding to reach a variance between allegation and proof said to exist in an information. Such a motion can be directed only against defects or intrinsic causes apparent on the face of the record, which vitiate the proceeding.

State vs. *G. Frey*, 106.

NEW TRIAL.

A new trial will not be granted on the ground of newly discovered evidence, where such evidence is designed merely to impeach the credibility of witnesses for the State, who testified at the trial, or, if it consists of rebutting evidence, still the new trial will not be allowed unless such evidence is sufficient to change the result, and could not by due diligence have been obtained at the trial.

State vs. *M. Diskin*, 46.

A new trial will not be granted by the Supreme Court unless it appear that injustice had been done. A large discretion is entrusted to the lower court in the matter of granting new trials, which will not be interfered with except for grave reasons. If the ground for a new trial be the insufficiency of the evidence to convict, the Supreme Court will not consider it, that being a question for the jury alone and exclusively.

The Judge has a right to order the jury to reconsider its verdict when a palpable mistake has been made, such as finding the prisoner guilty of an offense not known to our law. It is his duty to exhibit the mistake to them, and to explain the different verdicts they may find under the indictment.

State vs. *C. White*, 96.

Although a District Judge has improperly excluded jurors, the error is not such as entitles the defendant to a reversal of the verdict and sentence, and to a remanding of the case for a new trial, where it does not appear that the accused had exhausted his peremptory challenges before the jury was fully made up and did not obtain an entire panel of his own choice and an impartial trial.

State vs. *M. Farrer*, 315.

The complaint that the Judge in a criminal case has improperly overruled a motion for a new trial will not be considered when not presented in a bill of exceptions.

State vs. *J. Williams*, 742.

CRIMINAL LAW—*Continued.*

Where the ruling of the court, refusing a new trial, although it be of record and accompanied by the evidence heard, is not excepted to, a bill of exception taken to the admission of testimony, on the trial of the motion, will not be considered by this Court.

State vs. *P. Jackson*, 769.

This Court will not review the ruling of the Judge on a motion for a new trial, on the ground of newly discovered evidence, in absence of a bill of exceptions bringing up the ruling and the evidence. 32 An. 842.

State vs. *R. L. Belden*, 823.

Where the record of a criminal case contains nothing upon which the Supreme Court can act, the judgment is necessarily affirmed.

A motion for a new trial on the ground that evidence, of which the defendant knew, was more important than he had supposed, was properly overruled.

State vs. *J. Anderson*, 991.

TRIAL.

The presence of the accused in court when the verdict of the jury is received, on a trial for a felony, cannot be dispensed with, and the record must show that fact affirmatively.

State vs. *S. Johnson*, 208.

The postponement of a criminal trial to the next day after that on which it is set, although it may occasion inconvenience to the counsel and expense to the parish, will not of itself prejudice the prisoner's rights, nor will the fact that a civil cause is put aside, in order to take up the criminal trial, affect the regularity or legality of the conviction.

State vs. *H. J. Brown*, 340.

A mistrial and consequent discharge of the jury is not a bar to a second trial on the same indictment. The prisoner was not legally put in jeopardy on the first trial. The discharge of the jury on the first trial was within the sound discretion of the court.

State vs. *H. G. Blackman*, 483.

The refusal of the Judge to deliver his charge to the jury in writing upon the seasonable request of the party, as required by statute, is error, and justifies the avoidance of the sentence and judgment.

State vs. *Porter et al.*, 535.

The employment of private counsel, and his assistance of the District Attorney in his prosecution of the offense, is not sufficient to set aside the verdict. Decision in State vs. Gus. Anderson, 29 An. 774, reaffirmed.

State vs. *R. Mangrum*, 619.

CRIMINAL LAW—*Continued.*

In cases not capital, the trial court may in its discretion allow the jury to separate before the submission of the cause.

But in such cases, as well as in capital cases, the proceedings will be vitiated if a deputy sheriff, having charge of the jury, makes in their hearing statements of a damaging character to the accused, and if, in answer to a question of a juror, he informs him that the accused had been previously sentenced to the penitentiary for the commission of a heinous offense.

State vs. *J. Dallas*, 899.

In criminal practice no rule compels the trial Judge to charge the jury in the identical terms and language suggested by counsel for the accused. A charge embodying substantially the principle invoked by the accused, and containing a correct exposition of the law regulating the point involved, is sufficient and will be maintained by the Supreme Court. The following charge was properly refused in a criminal trial, as being argumentative and involving nice distinction in metaphysics, which it is not the province of the court to expound to a jury:

"In cases of wanton cruelty, the presumption is always against the State, for no man is cruel without some interest, without some motive of fear or hate."

State vs. *Porter et al.*, 1159.

VERDICT.

It is not every irregularity in the proceedings, or error in the instructions of the Judge, that vitiates a verdict or sentence, but it must be an irregularity that deprives the accused of some substantial right or protection, and an error so grave as to justify a belief that, but for its commission, a different and more favorable result to the accused would have been reached.

State vs. *Garic et al.*, 970.

The excusing of a tales juror by the Judge, although not legally exempt, and although the accused may have at the time exhausted his peremptory challenges, is not sufficient to vitiate the verdict.

State vs. *L. Hamilton*, 1043.

Where a part of the charge of the Judge to the jury is objected to, but it appears that the same has no bearing on the question of the guilt or innocence of the accused, and can in no manner prejudice him, whether correct or not, it will not be considered by this Court as affording any ground of relief from the verdict and sentence.

State vs. *Turner et al.*, 1103.

DAMAGES.

When a boy is shot intentionally or carelessly by another boy with a shot gun loaded with powder and fired off on one of the streets of New Orleans, the father of the boy who discharged the gun is liable for damages for the injury inflicted and suffering caused thereby.

The boy shot did not contribute to his own injury and excuse the fault of the other, because he would not or could not get out of the way when ordered by the boy shooting to do so.

Marionneaux, Tutrix, vs. *F. Brugier,* 13.

A degree of attention, beyond that given to an ordinary passenger, should be bestowed on one known to be affected by a disability, by which the hazards of travel are increased.

It is the duty of a street car driver to give passengers a reasonable opportunity to alight.

Where he does not stop a sufficient time, and starts before the passenger has stepped off, it is negligence.

For injury sustained, not only actual, but prospective damages should be allowed approximatively, in the exercise of a sound discretion. In such a case the liability of the Company is indubitable.

Mrs. Wardle vs. *City R. R. Co.,* 202.

As a general rule in action of damages, the damages should be estimated and assessed according to the condition of affairs existing before and up to the time of the institution of the suit, and a party is not entitled to recover expenses incurred for fees of counsel and expenses of attending the trial and for loss of time during the pendency of the suit, at least, without an amendment to the pleadings seasonably made, presenting such charges.

W. S. Campbell vs. *J. P. Short,* 465.

Where a person seizes and sells the property of one for the debt of another, but the proceeding, though unwarranted, is not wanton or malicious, the party seizing cannot be held for punitive or vindictive damages.

L. Kee & Co. vs. *Smith Bros. & Co.,* 518.

In a suit for damages because of a criminal prosecution, where the only witness of the plaintiff is himself, who admits there has been no loss of his business, exhibits an insignificant expenditure, and displays insensibility, a verdict for a small sum will be considered sufficiently punitory of the defendant.

J. Mailhe vs. *L. Lacassagne,* 594.

In an action for damages alleged to have been caused to plaintiff's property by the running of a railroad company's trains, which are

DAMAGES—*Continued.*

alleged to injure his property and to be a nuisance, by jarring and shaking his house, by making insupportable noises and emitting noxious smells and smoke, prescription cannot avail as a means of defense, because the acts charged are continuous, and because the causes and effects are renewed *de die in diem.*

When the petition charges that the defendant is doing certain acts, such as running trains through certain streets of a city, without warrant of law or sanction of authority, the defendant, under the plea of general denial, will be allowed to introduce in evidence private acts of the legislature and city ordinances purporting to authorize the acts complained of. As such acts are introduced for the purpose of rebutting the assertion of illegality, they need not be specially pleaded.

The legislature has the power to authorize the building of a railroad, using steam engines on a street of a city, provided the road be so constructed as not to exclude the public from any part of the street.

A railroad company which has laid a track on a street in a city, and runs steam trains thereon, under such authority, and with a substantial compliance with city ordinances regulating such use of the street, is entitled to the protection of the law which exonerates a party in pursuit of a legal right from any responsibility for damages, not shown to have resulted from his gross carelessness or culpable negligence.

Contraventions of city ordinances by the railroad company cannot be a cause of action by private parties, unless they allege and show damages resulting therefrom. The power to correct such abuses is vested in the city under its police power.

In an action for damages, the nuisance charged must be proved to be the legitimate result of the alleged cause, and not the result of other artificial causes.

In case of doubt the benefit thereof must be given to the defendant, if his trade is a lawful one.

Mrs. Werges vs. *R. R. Co.*, 641.

A railroad company is responsible for cattle killed by its trains, through the negligence and carelessness of its employees. Stevenson vs. N. O. Pacific R. R., affirmed.

The failure of a railroad company to introduce the testimony of its employees, who were on the train at the time of the accident, raises a presumption of negligence against the company.

DAMAGES—*Continued.*

Attorney's fees incurred in the prosecution of a suit for damages cannot be allowed in the same suit.

Mrs. Day and Husband vs. *R. R. Co.*, 695.

A master is responsible to his employee for damages caused to him by an incompetent fellow-servant.

Notice to the employer of such incompetence, and promise on his part to remove the incompetent fellow-servant, are not indispensable on the part of the injured employee, whose services are hired for a limited time, and who has a right to perform his contract and require his pay.

Laborers, who hire themselves out to serve on plantations, have not the right of leaving the person who has hired them, nor can they be sent away by the proprietor, until the term of their engagement has expired, unless for good and just cause.

The responsibility attaches, undoubtedly, where there is shown a formal notice and an express promise to change, and when a failure to remove and consequent injury resulting therefrom are established. The promise need not be explicit.

Where the verdict of a jury allows disproportionate damages, the allowance will be reduced by the appellate court.

M. A. Poirier, etc., vs. *D. R. Carroll*, 699.

A tramway, which occasions injury because its rail is out of place, is not protected from liability for damages by reason of the permission of the city to operate its road.

P. Dominguez vs. *R. R. Co.*, 751.

Proof of title, in an action for damages against a mere trespasser, is not required to be as complete and satisfactory as that required in a petitory action for the recovery of the land.

When the trespass is not wilful but the result of mere inadvertence, the value of the timber when first cut is the measure of damages.

Gardere vs. *Blanton et al.*, 811.

One who permits a railroad company to occupy and use his land and construct its road thereon, without remonstrance or complaint, cannot afterwards reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action for damages for the value of the land, or for injuries done him by the construction or operation of the road.

St. Julien vs. *R. R. Co.*, 924.

DAMAGES—*Continued.*

A person cannot treat a railroad's entry upon his land as tortious after he has by conduct acquiesced in it, and stood silently by until it was accomplished, and the road bed was equipped with ties and rails.

But a railroad company must not so construct its road as to inflict injury upon the proprietor of land over which it passes. It is liable in damages for injuries to the land occasioned by closing ditches and obstructing drains, whereby water is impeded or obstructed in its passage, and the crops are thus injured or destroyed.

The liability of a railroad company is substantially the same as that of an individual for torts or actionable injuries occasioned by its improper or defective construction, and for obstructions created by it to the natural flow of water, whereby adjacent land is injured in its cultivation.

Bourdier & Bellesein vs. *R. R. Co.*, 947.

Where, under a written contract, and for a valuable consideration, plaintiff acquired the privilege of erecting a sawmill on defendant's land and cutting and sawing timber therefrom, and before the expiration of the time allowed by the contract, his son in charge and his employees are driven from the place by violence, and plaintiff compelled to remove the mill, the jury, in estimating the damages, are not limited to the actual pecuniary loss resulting from a breach of the contract, but may treat the mode of its violation as an offense, and award damages therefor.

The wrong to the plaintiff was not less personal because the violence was used upon his employees, than if directed against himself. In such cases much discretion is left to the jury in assessing the damages.

W. Enders vs. *J. A. Skannal*, 1000.

A railway company is responsible for the damages occasioned by its failure to make road crossings.

When the right of way is granted on the expressed condition of making such crossings, and with the stipulation to that effect, the company will be held to the performance of its contract, and mulcted for its violation.

Attorney's fees are not recoverable in an action for damages when the act complained of is not tainted by fraud or malice.

D. Eatman vs. *R. R. Co.*, 1018.

The rule of our law, as well as of the common law, is, that he who owns and keeps a dangerous animal knowing it to be such, is bound, at his peril, to keep him up safe from hurting innocent persons, and if, for want of sufficient care, the animal escape and do injury, the owner is liable.

DAMAGES—*Continued.*

The *scienter* may be established by attendant circumstances without necessity, in all cases, of proving prior cases of injury.

Montgomery, Gullifer, Subrogee, vs. *G. H. Koester,* 1091.

The law is not, if a party threatens another with the commission of a wrong, unless he does an act which he is not obliged to do, that such party has a right to commit the wrong, and that the injured party cannot recover damages.

The authorities agree that, after a wrong has been committed, the damaged party shall not increase it, and that, if he does, he shall have no right to complain for loss or injury sustained in consequence of his wilful acts of commission or omission.

Damages can be recovered from an officer, although apparently acting in the discharge of official functions, for the execution of an order of his, which was unauthorized, arbitrary and wrongful.

The President of a Board of Health, ordering the fumigation of a vessel carrying a cargo of fruit, is personally answerable in damages where he thus acts under his declared personal responsibility, without authority from law or the Board, and arbitrarily; and where the cargo was in consequence damaged.

Where witnesses, who belong to the same trade and business, testify as to the value of articles within their line, the safe rule is to allow the lowest estimate.

W. S. Beers vs. *Board of Health et als.,* 1132.

In absence of proof of fault or negligence in the employment of incompetent or careless servants, an employer is not responsible for damages resulting to one servant from the fault or negligence of another. Upon the facts and circumstances disclosed by the evidence, plaintiff's claim for damages cannot be sustained.

C. Satterly vs. *C. Morgan,* 1166.

DEDICATION.

In a suit to recover a lot of land by purchasers from one who had donated the land to the defendant on the grounds:

That the act had not been accepted by the proper party; that the conditions of the donation had not been complied with, and the act had not been properly recorded, *held:*

That the donee was the Police Jury of the Parish of Jefferson, Right Bank; that the formal acceptance of the President of this body and the taking possession of the property and its continuous use by the donee, was a complete acceptance; that the building of a jail for the confinement of prisoners arrested in the parish fulfilled the condition of the act, which was that the property should be used for parish purposes; that the omission to register the renun-

DEDICATION—*Continued.*

ciation of the wife of the donor accompanying the donation did not invalidate the registry of the donation.

C. H. Lawrence et al. vs. *Police Jury, etc.*, 601.

DONATION.

They who have lived together in open concubinage are respectively incapable of making to each other a donation, either *inter vivos* or *mortis causa*, of movables exceeding one-tenth in value of their estate. A will, by which the whole estate of the concubine is given to her paramour, will be reduced, on application of her legitimate son, to one-tenth.

Succession of H. C. Hamilton, 640.

An act in which a party stipulates to make a donation *inter vivos* to a married woman, of a part interest of the donor's claim to lands left by his and the donee's common ancestor, on condition that the donee's husband shall undertake, at his exclusive trouble and expense, the recovery of all the lands claimed under the common ancestor, with the stipulation that the donee will be put in possession as soon as the donor is recognized as the owner of the lands, is really and in law a contract of mandate under which the husband agrees to take the steps necessary to the recovery of the lands, accepting as his compensation, in case of success, a part interest in said lands to enure to the benefit of his wife.

His wife and her heirs cannot recover from the so-called donor, if her husband failed to execute the suspensive condition of his contract. The nullity of such contract, as a consequence of the failure of the suspensive condition, can be urged as a means of defense by the donor or his heirs.

Widow Bouligny vs. *Janin et als.*, 748.

DUE PROCESS OF LAW.

It is now the settled jurisprudence of the Supreme Court of the United States that, except in actions affecting personal *status*, or in those partaking of the nature of proceedings *in rem*, like suits to partition real estate, foreclose mortgages or enforce privileges or liens, substituted service, as against a non-resident, can be effectual as "due process of law," under the 14th Amendment to the Constitution of the United States, only where, in connection therewith, property in the State is brought under the control of the court and is subjected to its disposition by process adapted to that purpose. The question being federal in its nature, former jurisprudence of this Court on this subject must yield to the authority of the Supreme Court of the United States.

J. Laughlin vs. *Ice Co.*, 1184.

ESTOPPEL.

The judicial declaration by the president of a bank, that a certain note is the property of his bank, will estop the same party from subsequently claiming that he was then the owner of the same note.

L. Folger vs. *E. C. Palmer*, 743.

EVIDENCE.

The authentic act of the ancestor cannot be attacked or contradicted on grounds of simulation or fraud, by simple heirs, but only by *forced heirs*, who, in order to be heard, must sue *as* forced heirs, and must allege and prove that the transaction attacked impairs their *légitime*, and that its annulment is essential for the enforcement thereof.

Boone et al., Executors, vs. *M. Carroll*, 281.

The record of a suit in another State is admissible in evidence to prove *rem ipsam*, but is inadmissible to establish the status of one not a party thereto or privy. The judgment rendered in such suit is not conclusive on those who had no notice, either actual or constructive, of the proceedings, and who made no appearance therein.

The depositions of witnesses, relating to pedigree, taken in this State to be read in evidence in another State, can be used as evidence in a subsequent suit in this State between different parties, when it is admitted that the witnesses are dead, and the testimony is offered for the sole purpose of proving pedigree.

Succession of J. A. Lampton, 418.

In a contract for the delivery of coal by one of the contracting parties to the other, within a given time, and the contract is silent as to the quantity, parol evidence is admissible to show the real intention of the parties in this respect and to explain its meaning.

W. S. Campbell vs. *J. P. Short*, 447.

Oral testimony is inadmissible between the parties to a written contract to show simulation. This can be done only by a counter letter, or written evidence amounting thereto. Conversations or understandings anterior to the date of the instrument attacked are presumed to be included in it. The rule applies to all written acts, whether they relate to immovables or to movables. The unbending jurisprudence of this State does not allow a party to vary or destroy his own voluntary declarations or written agreements by anything short of written evidence.

The rule is not binding on third parties. Oral testimony may be admissible, however, between the parties to prove a new and subsequent agreement as regards some part of the previous one.

The oral testimony received to show simulation of an act of dissolution

EVIDENCE—*Continued.*

of a partnership and a sale by one partner of his interest therein to another, should have been rejected.

G. W. Cary vs. *J. P. Richardson*, 505.

Parol testimony is admissible to prove a mistake in the description of lands set out in a deed of conveyance, where error is alleged, and even to show that a tract of land described therein was not sold, or intended to be conveyed by the deed.

J. E. Vignie vs. *Brady et al.*, 560.

Where a person's home was in this city, where his mother and nearest relatives also resided, and he left his home during the late war and joined the army, never returned and never was heard of afterwards, the lapse of time and absence under said circumstances are sufficient to create the presumption of his death.

Mrs. A. Jamison vs. *P. Smith*, 609.

Stale claims, long withheld from prosecution or presentation, are regarded with disfavor.

Extra-judicial admissions of a dead man are the weakest of all evidence, since they cannot be contradicted, and no fear of detection in false swearing impends over the witness.

The evidence of a claim that has long been delayed in its prosecution, when no hindrance was in the way, must be more conclusive than in ordinary circumstances. It must be established with more than reasonable certainty.

Bodenheimer vs. *Bodenheimer*, 1005.

EXECUTORS.

An executor residing out of the State, and who, coming here, represents himself as a resident and is recognized by the court as executor and as entitled to act as such, cannot claim that he was recognized as a domiciled executor and is exempt from bond, where he does not clearly establish that at the time he had changed his domicile.

Non-resident executors are not requested to take an oath, having already been sworn. The taking of an oath as executor here is a superfluity, and does not qualify them. The giving of the bond alone does.

Where there are two executors, and one qualifies and the other does not, the entire commission accrues to the one who has qualified. 25 An. 320, affirmed.

Succession of Bodenheimer, 1034.

EXECUTORY PROCESS.

One claiming to be the lessee of real estate, ordered to be seized and

EXECUTORY PROCESS—*Continued.*

sold, has no standing in court to arrest the sale and annul the order for executory proceedings. It will be time enough for him to set up his lease, if the same was duly recorded previous to the registry of the act of mortgage declared upon, when the property will have been sold and the adjudicatee will seek to evict or eject him.

An injunction does not lie to test questions pending on an appeal from the judgment in the case in which the judgment is enjoined.

A vendee and mortgagee, when sued on his note for the price, cannot champion the rights, if any, of parties to whom he alleges that the payee has transferred it. On payment of the note sued on, he will exonerate himself from liability, and will be entitled to have the mortgage inscription securing the note cancelled from the mortgage register.

An intervention or third opposition by one who has obtained an order of seizure and sale to pay a note secured by vendor's privilege and mortgage, is a conservatory measure, which does not change the character of the proceedings from executory into ordinary.

M. Carroll et al. vs. *Chaffe, Syndic*, 83.

In an executory proceeding by a syndic, to enforce payment of a note secured by vendor's privilege and mortgage, it is not necessary to accompany the petition for the seizure and sale of the property with any evidence of transfer of the note by the insolvent, who was the payee, to his creditors. Possession of such note by the syndic, even if unendorsed, is a presumption of such transfer. What title the payee had to it has passed to his creditors by the surrender and by the acceptance of it by the court.

In such a case it is sufficient for the syndic, under proper averments, to exhibit authentic evidence of his appointment as syndic of the creditors of the insolvent payee, the note and an authentic copy of the act of sale and mortgage.

Chaffe, Syndic, M. Carroll, 115.

A married woman separated in property mortgages her plantation, and dies, leaving a will and the property mortgaged to her surviving husband. The husband dies before the wife's will is probated, leaving by will the same property to his nephew. Under an order of seizure and sale the mortgaged property is seized, and the proceedings are conducted contradictorily with the executors of the husband's will. The executors enjoin, and their injunction is dissolved, and the executors do not appeal, but an appeal is afterwards taken by the legatee under the husband's will. *Held*, that such appellant cannot urge, for the first time before the appellate

EXECUTORY PROCESS—*Continued.*

court, that the order of seizure issued on insufficient evidence, and that the wife's succession was not represented in the proceedings, there being no such issues raised by the pleadings in the injunction suit, to which pleadings the attention of the Court must be confined.

S. B. & J. T. McClellan vs. *Maxwell et al.*, 318.

EXPROPRIATION.

In suits for the expropriation of lands for railroad purposes, the owners are entitled to the value of the lands expropriated, and also to damages, in addition to those sustained by the taking of the land.

Under our present Constitution private property can neither be taken nor damaged for public purposes without adequate compensation.

In estimating this adequate compensation, the location of the road bed near buildings, or so as to divide a cleared field, or the fact that it disturbs or destroys the system of drainage, and like circumstances, should be taken into account.

Since the damages in such cases are continuous and will last while the railroad remains, all the damages, present and prospective, which the land owner will suffer, should be assessed.

R. R. Co. vs. *H. T. Dillard*, 1045.

GARNISHEE.

In a garnishment process the judgment of the court ordering the surrender to the sheriff of the property held by the pledgee, and the sale of such property in satisfaction of the creditor's judgment, provided that no adjudication thereof be made unless the amount bid be sufficient to pay the garnishee's claim, is correct in law. In such cases the creditor cannot insist on an absolute sale, unless the amount of the bid would be sufficient to realize something for him, after satisfying the garnishee's privileged claim.

To successfully traverse the garnishee's answers the plaintiff must show that they are false, by positive written proof, or by the oath of two witnesses worthy of belief. C. P. Art. 264.

H. Bier vs. *Gautier & Godchaux*, 206.

When the answer of the garnishee denies any indebtedness to the defendant, no judgment can be rendered against the said garnishee, without a rule or other proceeding to traverse the answers of the garnishee. C. P. 264; 16 An. 253, 348; 19 An. 374; 27 An. 93; 28 An. 691; 6 An. 122; 31 An. 865; 32 An. 280.

It is only when the answers of the garnishee are an unconditional and unqualified confession of indebtedness to the defendant, that judgment can be rendered *pro confessis* against him. C. P. 246.

GARNISHEE—*Continued.*

Any proceeding to traverse or disprove the answers of a garnishee must be filed within twenty days after such answers are filed, or the garnishee is released. Act No. 27 of 1877; 31 An. 546.

J. David vs. *F. C. Rode*, 961.

HABEAS CORPUS.

The fact that a grand jury has found a bill for a capital offense is of itself a sufficient presumption of guilt to preclude any inquiry into the merits of the prisoner's case upon a *habeas corpus*, or upon an application to be bailed.

The constitutional provision that all persons shall be bailable, unless for capital offences, where the proof is evident, or the presumption great, is common to every Constitution this State has had, and its uniform judicial interpretation has been that the finding of a bill for a capital offence creates a presumption of guilt, sufficiently strong to preclude further inquiry into the merits of the prisoner's defence on an application for bail, and this presumption extends to all purposes except to that of a fair and impartial trial before a petit jury.

State ex rel. Hunter vs. *Sheriff*, 605.

HOMESTEAD.

Where a man dies leaving a widow in necessitous circumstances and an insolvent estate, and the widow dies without claiming the $1,000 reserved to her by law, and the children of the deceased are all majors, but there are minor grandchildren of the deceased, the offspring of a daughter who died previously to them, these grandchildren are entitled to the $1,000 from the succession, in preference to the major heirs or creditors.

Successions of A. Vives and Wife, 371.

Claims of homestead exemptions, affecting debts and contracts which existed previous to the adoption of the Constitution of 1879, must be controlled by the legislation in force at the time that the contract was entered into.

Homestead rights existing under the Act of 1865, cannot be affected by the provisions of the present Constitution, or of any laws passed in pursuance thereof. Affirming Poole vs. Cook, 34 An. 331; Gilmer vs. O'Neal, 32 An. 980.

W. H. Thomas vs. *Guilbeau, Sheriff*, 927.

HUSBAND AND WIFE.

Where a husband has been a party to an act of purchase of immovable property in the name of his wife, reciting that the purchase has been made with her paraphernal funds, and that the property is to be and remain her paraphernal property, neither he nor his

HUSBAND AND WIFE—*Continued.*

legatees or simple heirs will be permitted to contradict such recitals or go behind the deed. Creditors or *forced heirs* alone can do so, and the latter only to the extent of their légitime, and for the purpose of protecting the same. 31 An. 124; 33 An. 688; 34 An. 374; 9 An. 242; 30 An. 1036.

J. Kerwin et al. vs. *Hibernia Insurance Co.*, 33.

Improvements erected during marriage on the separate property of one of the spouses, even though made with community funds, belong to the owner of the soil, subject only to the duty of paying to the community at its dissolution the enhanced value of the property resulting therefrom. Art. 2408 C. C. clearly establishes that the enhanced value, above referred to, is only due to the community where the improvements have been made with community funds or labor.

In determining this question, the Article clearly contemplates proof to be made on both sides. Whether, in absence of any proof whatever on the subject, the bare fact that the improvements were made during the existence of the marriage, would be sufficient to establish the community right, need not be here decided. The presumption flowing from such fact, if it exists, is a light one; and we hold the evidence offered herein is sufficient to rebut it.

During the pendency of an action for separation from bed and board, the husband is not entitled to the exclusive benefit of revenues of common property, but on settlement of community must account therefor.

Mrs. J. Dillon vs. *L. Dillon*, 92.

The produce of the industry and labor of a wife, not separate in property, falls into the community; all business conducted by her labor and industry is the business of the community. Actions for damages for injuries to such business, as well as personal actions of the wife for injuries to her reputation, credit and feelings, must be prosecuted by the husband, as head of the community, and the wife cannot stand in judgment therefor.

A judgment in favor of the wife alone on such causes of action must be reversed.

J. Ford and Wife vs. *Brooks, Constable*, 157.

A husband may convey to his wife his interest as beneficiary heir in a succession. Such interest is susceptible of delivery, though the succession, at the time, is under administration. Nor does the wife, by a purchase of such interest, bind herself for her husband's debts. A recognition of such transfer by the administrator in his account, and his proposal to pay the fund representing such inter-

HUSBAND AND WIFE—*Continued.*

est to the wife, is evidence sufficient of his receiving notice of such *dation*. No notice to the co-heirs is requisite.

Successions of J. Webre and Wife, 266.

A married woman cannot recover damages for a violation of a contract, made by third parties with her husband, when there is no proof that the contract was made on her behalf or by her authorization, and when there is neither allegation nor proof that she was carrying on the business for which the contract was made, nor that her husband was her agent therein.

Max Nihoul vs. *Desforges, Montagnet & Co.*, 565.

Under the provisions of the Civil Code, Arts. 2387, 2391, the wife has the right of demanding the administration of her paraphernal property, previously confided to her husband, whenever she chooses, and this will include the restitution of the proceeds of such portions of her paraphernal property as may have been sold by the husband.

This demand need not be predicated upon, or accompanied by, a demand for separation of property or dissolution of the community.

Mrs. Weber vs. *Husband*, 806.

IMPUTATION.

A party who holds three judgments against the same debtor cannot be allowed to impute a part payment to the interests accrued on all three of his judgments, when it appears from the record that the sum realized by means of an attachment issued in only one of his judgments, to which the credit must be imputed.

Standifer & Co. vs. *J. A. Covington*, 896.

INJUNCTION.

The Court is without authority to impose damages in the same judgment dissolving an injunction taken out to restrain the collection of a license.

E. King vs. *Labranche, Tax Collector*, 305.

A party seeking to be appointed dative executor cannot be injoined from further prosecuting his demand in the courts. The remedy is by opposition to the application and appeal from an adverse judgment.

B. E. Hall, Executor, vs. *C. R. Egelly*, 312.

In an action on an injunction bond furnished to stay execution of an order of seizure and sale, the damages provided for by Article 304 of the Code of Practice, which are punitory in their character, cannot be allowed. In such an action only specially alleged damages can be recovered.

INJUNCTION—*Continued.*

In such cases, however, counsel fees for the dissolution of the injunction may be allowed, even when not proved to have been paid; it suffices that the liability therefor has been incurred.

An exception that the action is premature is dilatory in its character, and must be pleaded *in limine.*

T. O. Meaux vs. *Pitman et als.*, 360.

Where an injunction was taken against an order of seizure and sale for the payment of the price of property, on the ground that suit had been instituted against the purchaser for recovery of the property, and when the evidence shows that such suit was actually pending at the date of the injunction, the fact that, before trial of the injunction, the eviction suit had been finally decided in favor of the title, and the consequent dissolution of the injunction could not render the sureties on the injunction bond liable in damages, because the injunction had not been "wrongfully obtained." C. P. 298, No. 9.

D. R. Carroll vs. *Readheimer et als.*, 374.

The evaluation of damages which would be sustained, in the event of the commission of a certain act, to prevent which an injunction is sought, is the evaluation of the right, the invasion of which is feared and which is the matter in dispute.

The value of the right of possession, use and enjoyment claimed in this case, being stated as exceeding one thousand dollars, this Court has jurisdiction of the suit.

A tenant, like the owner of enclaved property, has a right of way of ingress and egress to and from the spot leased.

An injunction does not lie to prevent the lessee from using a wagon for the conveyance of his goods and effects, where it is shown that such use is almost indispensable and does not prove injurious to the lessor or of others having a right otherwise to complain.

The case would be different should the lessee misuse or abuse the privilege.

R. R. Co. vs. *McCloskey*, 784.

An injunction prohibiting the dilapidation of valuable real estate, and the construction of buildings thereon, although the property be in the possession of the party enjoined, should not be dissolved on a bond for an insignificant amount.

Where circumstances allow, the injunction should not be dissolved unless contradictorily.

J. Baldwin vs. *Bellocq et al.*, 982.

The test of jurisdiction in an injunction suit, where the property seized belongs to the judgment debtor, is the amount of the judgment injoined.

INJUNCTION—*Continued.*

Aliter if the property of another is seized, in which case the value of the property determines the jurisdiction.

J. C. Munday vs. *Lyons et al.*, 990.

INSANE PERSONS.

An insane person is incompetent to prosecute a suit either in her own behalf or as tutrix of minors.

A person who is neither curator nor tutor, cannot bring an insane person or minors into court, because no judgment rendered would be *res adjudicata* as to said insane person or minor.

J. Kerwin et al. vs. *Hibernia Insurance Co.*, 33.

Evidence as to mental condition, acts and conduct of a party prior to and up to the time of a contract, which would not sustain a proceeding for his interdiction, is not sufficient to establish his incapacity to consent to a contract. The law protects persons physically and mentally weakened by disease, even though not to an extent sufficient absolutely to destroy contracting capacity, against fraud, undue influence and overreaching by persons dealing with them; but, in this case, such circumstances are not established as would justify the annulment of the contract on any ground.

Baumgarden, Curatrix, vs. *J. J. Langles*, 441.

INSOLVENCY.

A rule lies at the instance of a definitive syndic to compel a provisional syndic to render an account.

The provisional syndic is not bound to render such account, from hand to hand, to the definitive syndic. He has the right of rendering it to the definitive syndic through the channel of the court, and of having all issues raised by oppositions to it adjudicated upon by the court.

The *ex-parte* homologation of such account, regardless of an exception to the right of filing such account, is a nullity and may be disregarded by the court.

T. R. Wood vs. *Creditors*, 257.

The decree of a court accepting a surrender and ordering a meeting of creditors, cannot be attacked collaterally by the party who provoked it, in the absence of nullities apparent on the face of the proceedings.

The appointment of a syndic, who has qualified, is subject to the same rule.

Proceeds in the hands of a sheriff, resulting from the sale of property of the insolvent, form part of his assets, and must be turned over

INSOLVENCY—*Continued.*

to the syndic of his creditors for distribution among them *in concursu.*

A judgment directing the delivery of such proceeds for such distribution does not strip the suing creditor of his rights, if any, thereto, which he will be at liberty to assert when an account shall be presented for a repartition of funds.

J. A. Bajourin vs. *D. S. Ramelli*, 783.

INSURANCE.

In a contract of insurance, the condition requiring preliminary proofs is one introduced solely for the benefit of the insurer and which he may waive either expressly or by implication; and where prolonged negotiations for settlement are conducted without such proofs, and settlement is finally declined upon grounds entirely exclusive of the absence of such proofs, this amounts to a waiver thereof.

The effect of such waiver is equivalent to the striking of such condition out of the contract.

The defense of fraud and false swearing in a statement of loss, requires that the swearing must not only be false, but knowingly and wilfully done with intent to cheat the Company. And where such statement was only made, as a preliminary to suit, after the insurer has made full investigations and after it has finally refused to settle the loss, and after negotiations for such settlement have been finally broken off, exaggeration of the loss contained in such statement cannot be construed as having been made with the intent or expectation to deceive or mislead the Company.

The condition authorizing the Company to rebuild cannot be invoked to defeat an action for pecuniary indemnity, unless the Company has distinctly elected to rebuild and has insisted thereon and put the insured in default for refusing to permit such rebuilding.

Charges of attempts by insured to bribe the Company's inspector and a builder are not clearly sustained in this case; but even if they were, however reprehensible, they do not, by themselves, fall within any condition of the policy, and cannot have the effect of extinguishing the Company's liability under the policy.

C. Daul vs. *Fireman's Ins. Co.*, 98.

Where a policy of insurance on buildings issues to a party, but the loss is, by the terms of the policy, made payable to another, who, the evidence shows, holds a special mortgage on the property, the party to whom the policy issues cannot alone and without authorization from the beneficiary maintain a suit to recover the loss.

Where, in the same policy, a lot of furniture is insured on account of

INSURANCE—*Continued.*

another party, the suit to the extent of the loss on the furniture will be maintained in the name of the policy holder, where it is shown that such beneficiary has authorized the suit for his benefit and his ownership of the furniture is proved.

J. Lane vs. *Sun Ins. Co.*, 224.

A stipulation in a policy of life insurance, issued by a Massachusetts company, that the unpaid portion of the year's premium shall always be considered as an indebtedness to the company, and that the failure of the insured to pay any instalment of premium when due shall operate a forfeiture of the policy, except as provided in Chapter 186, Laws of the Commonwealth of Massachusetts, approved April 10th, 1861, does not violate the provisions of that statute. Under such a contract the amount of the unpaid premium must be deducted from the net value of the policy at the date that the premium becomes due and is not paid, in ascertaining the net single premium remaining to the credit of the insured, and intended by the Statute to carry a temporary insurance, notwithstanding his failure to pay the stipulated instalment of premium when it became due.

M. Van Creelen vs. *Massachusetts Ins. Co.*, 226.

A son-in-law has not an insurable interest in the life of his mother-in-law.

When the insurable interest arises or is implied from relationship, it will be held to exist when the relationship is such that the insurer has a legal claim upon the insured for services or for support.

Even where such legal claim does not exist, but from the personal relations of the insurer and the insured, the former has a reasonable right to expect some pecuniary advantage from the continuance of the life of the latter, or to fear loss from his death, an insurable interest will be held to exist.

A policy of insurance, procured by one for his own benefit upon the life of another, the beneficiary being without interest in the continuance of the life insured, is against public policy and therefore void.

L. Rombach vs. *Piedmont & Arlington Ins. Co.*, 233.

The condition in a policy of insurance that claims thereunder shall be barred, unless judicially prosecuted within one year from the date of loss, is legal and not violative either of express provisions, or of the policy, of the law of prescription of this State.

The fact that plaintiff was arrested and prosecuted for arson, especially when such prosecution was not at the instance of defendant, furnishes no excuse for non-compliance with such condition.

M. Edson vs. *Merchants Ins. Co.*, 353.

INSURANCE—*Continued.*

A discrepancy, even if it be material, between the statements of the assured under oath in his proof of loss, and those made at the trial, does not constitute the false swearing that works a forfeiture of all claim under a policy of insurance; nor does an over-statement of the value of the property work such forfeiture, for a great difference of opinion upon values may well co-exist with perfect honesty of all the persons differing. The assured may have sworn to what he believes to be true, but which nevertheless is false, and his policy would not thereby be forfeited. To work such forfeiture, the assured must knowingly and intentionally, and therefore fraudulently have sworn with the intent to deceive the insurer and get from him a value falsely put upon the property.

A. Erman vs. *Sun Ins. Co.*, 1095.

In a contract of insurance, the insurer has the right to cancel the policy for non-payment of the premium, and is entitled to recover premiums earned during the time that he carried the risk.

Hibernia Ins. Co. vs. *F. A. Blanks*, 1175.

INTERVENTION.

An intervenor has no right to substitute himself to a defendant, and raise issues not set up by him; particularly, where he is a third possessor, acquiring real estate, mortgaged with the pact *de non alienando*, for the payment of a sum of money, and has legal notice of the mortgage and pact.

Such intervenor cannot require security against the appearance of the lost mortgage note, where defendant did not ask the same.

Mrs. M. Mayer vs. *L. Stahr*, 57.

The bond which intervenors are authorized to furnish under the provisions of Act No. 51 of 1876, to be restored to the possession of property attached, sequestered or provisionally seized in their hands, is a *forthcoming* bond, designed merely to secure the return of the property at the final determination of the suit, and under which no personal liability for the judgment to be rendered attaches.

Where the condition of the bond has been fulfilled, namely, the property has been surrendered in the condition in which it was received, the intervenors and their surety are entitled to be discharged.

S. Meyer vs. *Fletcher, Wesenberg & Co.*, 878.

JUDGMENT.

Under our jurisprudence a final judgment is the property of the party in whose favor it was rendered, and such party or his assignee or

JUDGMENT—*Continued.*

subrogee alone has the part to issue and control execution thereon. The District Court, to whom a cause is remanded from this Court, cannot execute the judgment rendered in the case in a manner differing from the order of this Court. In such a case the functions of the District Court are merely ministerial. It cannot render any new judgment which would authorize or render an appeal necessary. The execution which it orders is subject to the revision of this Court. And any error which it may commit in directing such execution, will entitle the party aggrieved to an appeal.

State ex rel. Southern Bank vs. *Pilsbury, Mayor, etc.*, 408.

The judgment of a Tennessee court can no longer be rendered *executory* in this State. The only remedy of the holder is to sue upon it as the evidence of a debt and to recover a judgment in a Louisiana court for the amount thereof, which will be a Louisiana judgment and executed as such. The court here is not concerned with the mode of execution of Tennessee judgments in that State, but only with the question whether the judgment is binding on the party sued here and has the effect of establishing, as a thing adjudged, the existence of a debt. If so, it entitles him to judgment in a Louisiana court for the debt evidenced thereby. In a former proceeding in this case, it was held that the defendant was bound by the judgment sued on, and on the merits no valid defense thereto has been established.

T. W. Turley vs. *Dreyfus, Executor*, 510.

An answer made by the defendants, in which they neither deny nor admit any of the allegations of the petition, but submit the case to the determination, joins issue as effectually as a judgment by default could have done. Such an answer and such judgment throw upon the plaintiff the burden of establishing the allegations of the petition as fully as if a special denial of each had been filed.

A judgment rendered on an issue formed by such answer, is not a consent judgment. Where rendered by a court, after hearing evidence and an opposing intervenor, it must be viewed as the result of the exercise of a judicial discretion, and as a decision of the issues presented.

H. V. Bayhi vs. *Bayhi et als.*, 527.

A judgment not final in its nature and character cannot be made final by the mere fact of its being signed by the Judge.

An interlocutory judgment which does not cause irreparable injury is not appealable. The ruling in Harris vs. Stockett, 35 An. reaffirmed.

State ex rel. Pflug vs. *Judge, etc.*, 765.

JUDICIAL MORTGAGE.

A recorded judgment operates as a judicial mortgage on real estate acquired by the judgment debtor, though his act of purchase be not recorded. The judgment creditor can, by the hypothecary action, subject the property to the satisfaction of his judgment, in case of the sale or transfer thereof. The purchaser of the real estate thus burdened has no right to urge defences against the judgment and mortgage which his vendor could not have set up.

Heirs of Gallaugher vs. *Congregation*, 829.

JUDICIAL SALES.

The adjudicatee of property at judicial sale, being entitled to pay but once to receive a clean unincumbered title, when harrassed by conflicting claims of mortgage and other rights, may call the various claimants to interplead and settle their claims contradictorily with each other, to the end that he may pay advisedly to his secure exoneration.

Under the peculiar constitution and rules of the Civil District Court for the Parish of Orleans, such a proceeding, having all other elements of a direct action, may be filed in the suit in which the adjudication was made.

The erroneous styling of such a petition as an *intervention* will not invalidate it, if it contains the essentials of a proper and lawful action.

J. C. Morris vs. *Cain et al., Executors*, 759.

An injunction staying an executory process cannot have the effect of impairing the legal value of the notes and mortgage on which the process had issued.

If the property be seized by the holder of a mortgage inferior in rank, during the pendency of the injunction, and if it be adjudicated to the owner of the ranking mortgage, the adjudicatee has the legal right to retain the amount of his mortgage in satisfaction *pro tanto* of his bid.

E. B. Mentz vs. *Train et als.*, 955.

JUSTICE OF THE PEACE.

Under the provisions of Article 1084, C. P., either party is entitled to delay for the purpose of preparing his case, in a cause pending before a justice of the peace, on the first fixing of a cause.

Under Article 1085, if the parties fail to appear at the appointed time, and if they reside in the country, the justice of the peace must wait two hours before he can render a valid judgment in the premises.

State ex rel. Montague vs. *Justice, etc.*, 1101.

LANDS.

Where the government, in the Act of Congress confirming a title to land, makes special reservation of the rights of all parties then claiming an interest therein, such parties are remitted to the State courts for the litigation of their claims.

The holder of a patent with such reservation will be considered as plaintiff in a petitory action against adverse claimants, whatever be the form in which he makes the attack, and must therefore recover on the strength of his own title.

L. Lavedan vs. *F. F. Trinchard*, 540.

Land held under a certificate of entry enters the domain of private property and becomes a subject of contracts, and is fully under the operation of our laws touching the property rights of all classes of persons, and such certificate is sufficient evidence to support a petitory or other real action.

Where land is entered in the name of the wife during the marriage, but the patent issued after the community is dissolved by a judgment, the land will be presumed to be an acquisition of the community. The title dates from the certificate and not from the patent.

Simien, Admr., vs. *Perrodin et als.*, 931.

The State of Louisiana, during the war between the States, preserved her autonomy, and possessed a fully organized government.

She did not forfeit her title to the swamp lands previously acquired by becoming a member of a Confederacy at war with the United States. During the pendency of the war she had the power to sell her lands, and her officers charged with such duties to make the sales, and the purchasers acquired valid titles, if the State laws relating to such sales were complied with.

There is a legal presumption that all swamp lands were surveyed before their selection was approved by the general government. The law required them to be surveyed before presented for approval, and the officers charged with approving them are presumed to have done their duty.

The same presumption exists in case of entries, under the State preemption laws, that the conditions have been complied with, and it is only the conclusive evidence that can overthrow such presumptions.

Where plaintiff and defendant both hold title from the State, the first purchase must prevail, if not successfully impeached.

R. T. Cole vs. *Thompson et als.*, 1026.

LEASE.

The goods of a third person found in a leased store, where they had been consigned by their owner to the lessee, to be sold by the lat-

LEASE—*Continued.*

ter at a price fixed by the owner, with the understanding and agreement that the lessee or consignee could keep, as his compensation, all that he could obtain above the inventoried prices, and that no rent or storage was due by the owner, will be affected by the lessor's privilege, and are liable to the latter's seizure for unpaid rent due by the lessor.

W. M. Goodrich vs. *T. B. Bodley*, 525.

In absence of all privity between plaintiffs and defendants, the former, who are lessees of the wharves from the City, and have no rights except such as are derived from the City, can claim no rights against the defendants as former lessees, which the City herself could not have urged against them. Under the contract between the City and defendants, as construed by both parties thereto, the defendants had the right to collect and appropriate the entire wharfage due by vessels which had moored at the wharves prior to the expiration of their lease; and as the City was estopped from claiming return of any portion thereof, plaintiffs cannot do so. If the City has transferred to them a right which she did not possess, they must look to her for indemnity, and not to defendants.

J. A. Aiken & Co. vs. *Eager, Ellerman & Co.*, 567.

The subrogee to a lessor's rights is entitled to claim, with provisional seizure, whatever rent was due at the date of the transfer.

A stipulation is a lease to pay part of the rent to a person named, does not divest the landlord of a right to the amount, where the stipulation *pour autrui* was not accepted previous to the transfer. The subrogee is entitled to claim such amount in the right of his subrogor.

The burden of proof is on him who alleges payment. The plea admits the debt.

Damages cannot be allowed to a seized tenant, where the rent claimed was due at the date of seizure.

W. A. Martin vs. *L. Dickson*, 1036.

MANDAMUS.

In case of mandamus against public officers in Louisiana, the proceeding does not abate by the retirement from office of such officers.

A mandamus does not lie against the City of New Orleans, to compel the budgeting of a judgment which is a nullity on its face.

State ex rel. Company vs. *New Orleans*, 68.

A mandamus lies to compel the granting of an appeal from a judgment dismissing part of a petition and part of the prayer thereof.

MANDAMUS—*Continued.*

It is no defense to an application for such remedy, that the case, for the remaining part, continues pending before the court, or that the judgment is interlocutory and causes no irreparable injury.

Such judgment is a *final* judgment, requiring, as in fact it received it, signature by the Judge.

The fact that the plaintiff continued the prosecution of the remaining part of the case and that he did not, upon the refusal of the appeal, apply for a mandamus, cannot be considered as an acquiescence in the judgment, or an abandonment of his right of appeal.

State ex rel. Ikerd vs. *Judge, etc.*, 212.

A mandamus cannot lie to compel a District Judge to grant an appeal to the court from a judgment dismissing a case, as to one of the defendants, where an exception is filed to the jurisdiction, and the petition in the suit shows that the amount claimed is less than one hundred dollars.

Such dismissal does not extinguish the corporation, plaintiff in the case. The suit continues to be pending as to the other defendant.

State ex rel. Page, etc. vs. *Judge, etc.*, 217.

A mandamus lies to compel a District Judge to sign *de nova* a final judgment improperly signed by him. An appeal is not the only mode to test the validity of such signature.

Such judgments do not become final unless upon being signed in the manner and form prescribed by law.

State ex rel. Orleans R. R. Co. vs. *Judge, etc.*, 218.

A mandamus cannot be granted where, if allowed, it would prove unavailing.

It does not lie against municipal authorities in existence in 1883, to place a sum on the City budget of 1879, when the revenues and receipts of that year, as therein stated, have been applied to the expenditures therein specified.

The rights of the relator are secured by the registry of his judgment, under Act 5 of 1870 and the ruling in 33 An. 129.

The decision in the Southern Bank case, 31 An. 1, is no authority, having been reversed in all its parts by the U. S. Supreme Court.

State ex rel. Fazende vs. *New Orleans*, 221.

A mandamus is the proper remedy to compel an inferior Judge to sign bills of exceptions properly taken and tendered for signature, and, under the circumstances of this case, the mandamus is granted.

State ex rel. Wyly vs. *Judge, etc.*, 248.

A mandamus does not lie to compel an attorney appointed Judge *ad hoc* to try a cause in which the District Judge has recused himself,

MANDAMUS—*Continued.*

when the question of the validity of the recusation, which involves that of the legality of the appointment of the Judge *ad hoc*, is pending, on a suspensive appeal, before the appellate court.

State ex rel. Perché, etc., vs. *Judge, etc.*, 603.

A mandamus does not lie to the Court of Appeals, to compel it to take jurisdiction of a case which it has dismissed, where it appears that the amount claimed or the matter in dispute exceeds one thousand dollars.

It is indifferent whether the demand be made in a direct suit, or in an opposition to an administrator's account in the settlement of a succession, showing for actual distribution an amount less than $1,000.

State ex rel. Dupierris vs. *Judges, etc.*, 736.

A mandamus lies to compel the granting of a suspensive appeal from an order directing the delivery of a bank box, said to contain effects of a value exceeding one thousand dollars.

The delivery might occasion an irreparable injury.

On an application for the remedy, the appellate court cannot pass upon the correctness of the order of delivery.

State ex rel. Baumgarden vs. *Judge, etc.*, 745.

Neither the District Court, nor this Court, has jurisdiction to issue a mandamus, to a municipal officer of the City of New Orleans, for the purpose of drawing money from the municipal treasury.

Section 1 of Act 5 of 1879 is an absolute prohibition and must be respected.

It applies to all persons and to all claims, whether liquidated or not by judgment or otherwise.

It does not deprive creditors of other process.

A mandamus may issue at the instance of judgment creditors, under other Sections of the Act, for other purposes. It does not lie for the object of this proceeding.

State ex rel. Klein & Co. vs. *New Orleans*, 781.

A mandamus does not lie to compel a Judge to render judgment, or to sign one which is tendered him by counsel, in accordance with the verdict of a jury, when there is a motion for a new trial pending and undecided, and where the Judge *proprio motu* has quashed the verdict and reinstated the case to be tried anew.

State ex rel. Wentz vs. *Judge, etc.*, 873.

Mandamus will issue to compel the granting of a suspensive appeal in a case where the constitutionality or legality of a fine, forfeiture or penalty, imposed by a municipal corporation is involved, although the pleading before the municipal authority may not

MANDAMUS--*Continued.*

have set forth the particular law or constitutional provision violated. The sufficiency of the defense will be adjudged on the appeal.

State ex rel. Roos vs. *Shreveport*, 887.

A mandamus does not lie to compel a District Judge to appoint an attorney-at-law to try a case in which he has recused himself as having been of counsel, when the court, of which he is an officer, is represented by another Judge clothed with concurrent powers, and who is not himself recused.

The Act of 1880, No. 40, is inoperative in such a case.

Under Act of 1882, No. 71, the Judges of the District Court for the First Judicial District are authorized to adopt rules for the classification and distribution of causes before that Court, and to provide for the trial of recused cases.

A prohibition does not lie to prevent the other Judge, not recused, from trying such cases in which his fellow Judge is recused as of counsel.

State ex rel. Hardenburg vs. *Judges, etc.*, 1007.

MARITIME LAW.

Where the terms of a charter party show that the vessel chartered is to carry freight and passengers, and it is shown that either freight or passengers were carried, the charterers will be held commercial partners, and bound *in solido*.

It is not a breach of the warranty of seaworthiness, that the master of the vessel was drunk at the port of delivery whilst the cargo was being discharged, where the duty of discharging devolved on the consignees of the charterers.

Thomas O. Mahoney vs. *A. Martin et al.*, 29.

MARRIAGE.

In the absence of primary evidence to prove marriage, it may be proved by secondary or circumstantial evidence.

Reputation and long cohabitation will create a presumption of marriage; but such presumption can be rebutted by negative testimony.

Acts of the parties, showing their own conception of their mutual relations, are the best test of the legality of marriage, of the celebration of which no proof has been, or can be adduced.

The reputation which gives rise to a presumption of marriage must be general and consistent, and must rest on proof showing that the relations between the parties began with a free consent to enter the state of matrimony.

Mrs. Powers vs. *Executors of Charmbury*, 630.

MARRIED WOMEN.

The Judge of the late Second District Court for the Parish of Orleans was competent to exercise the functions of authorizing married women to contract loans, etc., under C. C. Arts. 126, 127, 128.

It is now settled that in loans made under such judicial authorization, the lender is not bound to look behind the Judge's certificate, and is not concerned with the actual use to which the money loaned to the wife is put.

Mrs. Dougherty vs. *Hibernia Ins. Co.*, 629.

A married woman has the right to borrow money and to secure its return by mortgage on her property, with the authority of her husband, given concurrently with that of the District Judge of her domicile, or without it.

Where judicial sanction is obtained, the creditor is relieved of the necessity of proving the loan, and that it enured to her benefit; the burden is upon her, under proper charges, to prove that she is not liable. Where the sanction is not procured, the creditor is required to make the proof.

The authority of the Judge is cumulative, not restrictive or exclusive in character.

F. A. Darling vs. *Lehman, Abraham & Co.*, 1186.

MINORS.

Where minors are interested in an immovable owned in indivision by several co-owners, a judicial partition is the only mode of making a legal division of such property. The co-owners of an undivided portion of a large tract of land cannot effect a legal partition of the same without making the owners of the other portion of the said property parties to their suit for partition.

An undivided portion of a larger and undivided tract of land cannot be legally partitioned among the owners thereof.

C. Ware et al. vs. *A. Vignes et als.*, 288.

Where a third person owes to a minor a debt secured by mortgage, which is due, he has the absolute right to pay the same to the duly qualified tutor of the minor, and thereby to extinguish the mortgage. And because the tutor has squandered the money, that is no reason why the minor may have recourse upon his former debtor or his assignees.

P. G. Riddell vs. *A. Vizard*, 310.

Specific compliance cannot be required from the purchaser of real estate where the title tendered is not clear and good, and not such as he is bound to accept.

Where a tutor sells at private sale his individual share of a piece of

MINORS—*Continued.*

real estate, against which his minors' mortgage stands recorded, the share is transferred burdened with the encumbrance, which continues to attach thereto until removed.

Where the property, part of which was thus conveyed, is offered for sale under a judgment in partition, and it appears that the price corresponding to the minors' share is not paid to the tutor then in office, but that a similar sum was paid, years previous, to one who was then tutor, who had then no authority to sell, and who has since ceased to be such, and the sale is made on terms at variance with those fixed by the family meeting and approved by the court, the minors' share was not divested and no title thereto did pass to the adjudicatee.

The property of minors can be sold only upon the observance of legal exigencies and upon settlement of the price of sale with one having authority to receive the same and who can make the title.

H. Abraham vs. *Widow C. Lob*, 377.

The capacity of a tutrix cannot be attacked collaterally; neither can that of an under-tutor.

Where proceedings are carried on for the sale of minors' property, in the name of a tutrix, by an attorney-at-law of undisputed authority, and they appear substantially regular and were conducted contradictorily with the under-tutor, a decree of sale from a competent court is protection to the purchaser.

The law does not require that proof be made to the Judge, before he grants the order for a family meeting, that there exists a necessity or propriety for the sale. The members of the meeting are a specially constituted tribunal to pass primarily on such issue. Property of minors can be sold when it is unproductive and onerous, for it is then advantageous that it should be disposed of.

Payment of the price to a specially authorized agent of the tutrix is payment to her and concludes the minors.

Succession of J. Hawkins, 591.

An irregularity in the transfer of minor's property may be ratified by him after his majority. And such ratification may be inferred from long continued silence and inaction on his part touching the property.

Mrs. A. Jamison vs. *P. Smith*, 609.

Where a man dies, leaving a widow in community and one minor child issue of the marriage, and the mother qualifies as natural tutrix and remains in possession of the estate, she can, by the authority of the Judge under the advice of a family meeting, borrow money to pay the debts and charges upon the estate, and mortgage property

MINORS—*Continued.*

to secure the loan. The property is regarded as the effects of her ward administered for his ultimate advantage.

Where there is no tutor, the minor is properly represented in the proceeding to foreclose the mortgage by a *curator ad hoc.* C. P. 116; 34 An. 885.

Though, in an executory proceeding, the notice to the debtor is issued by the sheriff instead of by the clerk, it is not such an irregularity as to justify the annulling of the sale made under the proceeding, nor does the failure of the record to show that the under-tutor took the prescribed oath, where it appears he was appointed and was present at the family meeting and approved the proceedings, constitute a sufficient ground of nullity.

Succession of Sadler vs. *B. J. Henderson*, 826.

A party who receives funds for minors, without having been appointed and qualified as tutor, assumes the responsibilities of an intermeddler or *negotiorum gestor*, and will owe interest on such funds from the day that they were received by him.

The claim for the recovery of such funds is subject to the prescription of ten years, to be computed from the age of the majority of the minors.

Succession of W. L. Richmond, 858.

When a minor is lawfully summoned by a sheriff to serve as a member of a *posse comitatus* to aid in the arrest of an escaped convict and, while so engaged, negligently and with legal fault shoots another member of the same *posse* by mistake for the convict, the parent of the minor with whom he resides cannot be held responsible for the damages occasioned thereby.

The law obliged the minor, being of proper years, to serve on the *posse*, and suspended the paternal authority, and subjected him to the exclusive authority of its officer, and paternal responsibility being the offspring of the paternal authority, the legal interruption of the latter operated a like interruption of the former.

Mrs. A. Coats vs. *J. M. Roberts*, 891.

Under the provisions of Sec. 8 of Act 95 of 1869, (R. S. 3093) on the subject of mortgages, the *affidavit* of a tutor, stating his indebtedness with necessary facts to his ward, and recorded prior to the 1st of January, 1870, is a valid registry of the minor's tacit mortgage, and preserved it as effectually as if an extract of the inventory of his estate had been registered.

This ruling is made in a case in which, at the time of inscription

MINORS—*Continued.*

which was the last day of December, 1869, no inventory had been taken of the minor's property.

E. Broussard et al. vs. *Segura, Clerk, et al.*, 912.

When, after the minor's mortgage has been preserved, by the inscription of the abstract of inventory under the Act of 1869, the minor arriving at the age of majority has liquidated his mortgage by account and judgment against his tutrix, the inscription of such judgment is sufficient to preserve his mortgage thereafter, and there is no necessity of reinscribing the abstract of inventory.

E. J. Smith vs. *W. W. Johnson*, 943.

MONITION.

An opponent in a monition proceeding is in no case required to make an antecedent tender as a condition precedent to opposing confirmation of sale.

Where he has engrafted on his opposition a petitory action, although the exception of want of tender may avail to dismiss the latter action, it should be restrained in its effect to this extent, and should not operate as a dismissal of the opposition.

Fazende & Seixas for Monition, 1145.

MORTGAGE.

The hypothecary action lies to compel payment of a note secured by mortgage, where the third possessor was made aware, by the recitals in his title, that the note represented by the vendor as paid was outstanding and that the inscription of the original mortgage was cancelled.

A third party acquiring such note before maturity, in good faith, in the ordinary course of business, for a valuable consideration, without any knowledge of its assumption by one who was not the drawer thereof, is not affected by equities which might exist between such party and his own vendor or a subsequent vendee, and is entitled to demand the surrender of the property mortgaged or payment of the note.

The third possessor is as effectually estopped from disputing the validity of the note and mortgage as his vendor would have been.

Parties who, by anticipation, pay mortgage notes for which they may be liable, should, at least, cancel or deface them after such payment, if not cause the mortgage inscription to be erased, in order to protect third parties.

Where one of two persons must suffer a loss, the law throws it upon him by whose negligence or fault the damage was occasioned.

George Shepp vs. *Thomas Smith*, 1.

MORTGAGE—*Continued.*

The purchaser at a public sale is entitled to demand an unencumbered title before being compelled to comply with the terms of the adjudication.

A mortgage describing the property hypothecated as "un vaste terrain à l'encoignure des rues Orléans et Bourbon," will not be held invalid for want of sufficient description of the "nature and situation" of the thing, at the instance of one who has not been misled thereby.

A mortgage made by a mortgagor alone for the security of bonds to be negotiated is not *ab initio* invalid for want of a concurring mortgagee. It stands as a valid, unilateral contract, but remaining suspended and imperfect until the bonds are issued and negotiated, when the mortgage takes effect in favor of the holders of the bonds, whose acceptance of the mortgage is sufficiently evidenced by the acceptance of the bonds secured thereby.

M. A. Roberts vs. *J. Bauer et al.*, 453.

Where the inscription of a mortgage by authentic act contains a copy of all portions of the act upon which the mortgage is based, it complies with the requirement of Art. 3348, Rev. C. C., although it be not a copy of the entire act.

Estate of L. Prudhomme, 984.

MOVABLE PROPERTY.

Personal or movable property has its *situs* at the domicile of the owner. Its administration is governed by the laws of that domicile. Movable property in another State belonging to a testatrix must be administered by the court of her domicile.

Succession of Susan B. Thomas, 19.

MUNICIPAL CORPORATIONS.

A charge or commission for an attorney's fee, where a parish license is sought to be collected by suit, imposed by an ordinance of a police jury, cannot be collected. The parishes are without authority to impose such charge.

Hunter, Sheriff, vs. *C. Lisso*, 230.

A town councilman, who became a justice of the peace, is not recusable in a case wherein the legal composition of the council, or the validity of the ordinances passed while he was a member thereof, is contested.

Alexandria vs. *Williams et al.*, 329.

The debt sued for in this case being for the current expenses of the municipal corporation, and payable out of the current revenues of the several years in which it was contracted, does not fall

MUNICIPAL CORPORATIONS—*Continued.*

within the restrictive operation of Section 2448 of the Revised Statutes.

S. G. Laycock vs. *Baton Rouge*, 475.

Municipal corporations may adopt ordinances for the good order of the community, and where the power to suppress bawdy houses is conferred, the power to adopt means for that suppression follows by necessary implication.

An ordinance which prohibits bawdy houses being kept in an indecent manner need not specify the various acts of indecency which will render its keeper liable to punishment.

Shreveport vs. *Fanny Roos*, 1010.

The power to amove a corporate officer from his office for a reasonable and just cause, is one of the common law incidents of all corporations.

The general rule is, that courts are without power or jurisdiction to impede by preliminary injunction the usual functions of a municipal corporation.

A provision in a City Charter vesting a City Council with the power to try all impeachments of City officers, the judgment only extending to removal and disqualification to hold any corporate office, is not unconstitutional as authorizing the exercise of judicial powers by a legislative or municipal body, but it is rather the exercise of a power necessary for its police and good administration.

Courts are powerless to interfere by injunction with a municipal council in the exercise of that power. An injunction thus issued is a nullity, and will be vacated by prohibition.

The State ex rel. Behan, Mayor, et al. vs. *Judges, etc.*, 1075.

Violations of the ordinances of a city, passed in the exercise of the expressed or implied powers vested in municipal corporations, and relating to acts not included in the criminal laws of the State, cannot properly be regarded as crimes to which the constitutional guarantees of prosecution, by indictment or information and trial by jury, pertain.

The constitutional prohibition against slavery or involuntary servitude does not relate to the mode of punishment of any class of offenders, but was directed against any attempt to reëstablish the system of slavery once prevailing in some of the States, or any species of servitude resembling it.

Likewise, the prohibition against fixing by law the price of manual labor refers exclusively to contract labor. Hence, where a party was sentenced by the Recorder of Monroe to pay a fine of $50, for

MUNICIPAL CORPORATIONS—*Continued.*

keeping a disorderly house, and in default of payment to work on the streets of the city at the rate of one dollar per day until the same were paid, is not illegal and void.

City of Monroe vs. *F. S. Meuer*, 1192.

NEW ORLEANS.

The property known and designated as the "*commons*," acquired by the treaty of cession of Louisiana, was donated in 1807, by the United States to the City of New Orleans, on two conditions: 1st, that a reserve would be made of a strip through it, to enable the N. O. Navigation Co. to connect its canal and basin with the river; and, 2d, that the same would forever remain open as a public highway.

The sale by the City in 1809 of lots fronting the space selected for the purpose and known generally as the "*neutral ground*," was made in reference to the dedication, as shown on the plan drawn up at the time, from which it appears that the space was described as "*Rue et Promenade.*"

The right of the Navigation Company was subsequently acquired by the City.

The destination of the strip of ground was not changed by the City. If it was altered, the City had the right to do so, derived from the Code, the Statute and her charter.

The City has authority to grant a right of way through her streets and other property.

The City first granted the privilege of way to the New Orleans City Railroad Company in 1876, but subsequently recalled it, and again in 1881 conferred it anew.

The ordinances concede the right of laying tracks from Basin to Carondelet, but not that of using *steam* as a propeller.

The plaintiffs were owners at the time the tracks were laid and did not object thereto. Their silence is an acquiescence.

The right to use steam not having been granted, the Company has no authority to run and station their trains, moved by that power, as they do, between the designated points.

The use of steam is therefore a nuisance, if not actual, at least constructive.

The injunction asked cannot issue to prevent the defendant Company from using the tracks, but only to prohibit the use of steam, between the two streets named.

F. W. Tilton et al. vs. *R. R. Co.*, 1062.

The City of New Orleans has the right to grant the privilege of laying pipes and conduits across and through the river bank and the

NEW ORLEANS—*Continued.*

public streets, to parties asking the same, to draw water from the river for their own use and purposes.

The right thus conceded does not come in conflict with those of the Waterworks Company, and can, therefore, be legally exercised under the terms of the privilege, and during the pleasure of the municipal authorities.

N. O. Waterworks Co. vs. *Sugar Refinery Co. et al.*, 1111.

NEW TRIAL.

Where it appears from anterior proceedings, that the District Judge has sustained his jurisdiction, it would be doing a vain thing to require the filing of an exception and its overruling, before considering an application for a prohibition. The rule in 29 An. 809 is not thereby infringed.

The writ does not lie to prevent a District Judge from trying exceptions filed after the granting of a new trial.

A judgment prematurely signed does not become final and produces no effect, where a motion for a new trial is seasonably made and subsequently granted.

Such motion, in the country parishes, where first continued to another term by consent of parties, and next, from term to term, by the court, and which the mover has uniformly endeavored to have tried, does not lapse at the close of either of the terms. It can be entertained and allowed by the Judge, where good cause is shown.

The granting of such a motion for a new trial practically obliterates the premature signature of a judgment.

12 An. 562; Estopinal vs. Zunts, not reported, O. B. 45, folio 24, and State ex rel. Wentz vs. Judge 5th Dist., 35 An. 873, affirmed.

State ex rel. Allen & Syme vs. *Judge, etc.*, 1104.

PARTITION.

Co-heirs have the right to sue for a partition by sale where the property held in common cannot be conveniently divided in kind, although the shares of other heirs therein be burdened with mortgages.

A judgment directing such partition cannot be attacked collaterally. If it was rendered on insufficient evidence or in disregard of the forms prescribed by law, it can only be revised on appeal. If it was obtained by ill practices, not patent on the record, the remedy is by an action in nullity.

In partition suits the validity of the adjudication does not depend upon a proportion to the appraisement. The property can be legally adjudicated regardless of the valuation placed upon it, even when minors are co-owners.

Co-heirs have a right to assemble and consult touching the propriety of

PARTITION—*Continued.*

purchasing or not the property to be sold for a partition. In case of adjudication to them, they are authorized to retain the price until their rights in the succession have been liquidated. They have the right of fixing for their respective shares such terms as they may deem most advantageous.

The fact, if it exist, that revenues or profits were yielded by the property previous to the adjudication, and are unaccounted for, does not affect the validity of the sale.

In partition suit between co-heirs, the mortgages affecting the share of any one of them are referred to the proceeds, and either of them can, *by rule* against the mortgage creditors, have them so relegated and the inscriptions thereof erased from the mortgage book. Such creditors have the right to contest the validity of the sale in such cases.

This case is differentiated from that in Life Association vs. Hall, 33 An. 53.

A distribution proposed in the lower court and not disputed on appeal will not be disturbed.

H. V. Bayhi vs. *Bayhi et als.*, 527.

Property acquired by an heir at a partition sale of his ancestor's succession, if paid for by his heritable share thereof, is and remains an inheritance, and the mode of acquisition is not a sale in the ordinary or legal sense of that word.

The resolutory condition which is implied in commutative contracts, and which inheres specially to a sale, does not attach to such mode of acquiring property.

M. A. Wade, Tutrix, vs. *C. B. Murray, Executor*, 546.

A partition defective in form and voidable for lesion may be ratified by word and deed, and made conclusive and binding.

J. S. Bacon vs. *M. C. Schultz*, 1059.

PARTNERSHIP.

Articles 1138 *et seq.* of the Civil Code, entitling the survivor of a commercial partnership to be appointed liquidator of the partnership by the court where the succession is opened, do not apply to testamentary successions.

Where the executors of the last will of the deceased oppose such appointment on just and reasonable grounds, the court is not justified in making the appointment.

In no case has the surviving partner a right to such appointment where, by the partnership contract, it is provided that such survivor shall have a certain term to wind up the business, and it is

PARTNERSHIP—*Continued.*

shown that during that time, though in possession of all of the assets of the partnership, with full powers of administration, he has taken no step towards a liquidation of the concern.

B. Klotz vs. *Macready et al., Executors*, 596.

A commercial partnership may hold title, in its firm name, to real estate, when acquired by consent of the parties, who thereby became joint owners thereof.

Allen, West & Bush vs. *Whetstone et al.*, 846.

Under the statutes of the State relative to the appointment of Branch Pilots of the Port of New Orleans, and regulating their duties, a partnership or association of the said pilots, though State officers, for the purpose of furthering and protecting their common interests, is not illegal. Under the language of these statutes such association is authorized, and excepts the pilots from any legal principle which would forbid such an association of State officers for the purposes declared.

Articles 1926, 1927, 1929 of the Code, authorizing specific performance of obligations to do or not to do in certain cases, apply to contracts of partnership as well as to other conventional obligations.

Where, by a valid contract of partnership, a partner bound himself: 1st, to devote his time, labor, skill, etc., to the partnership business; 2d, not to carry on the partnership business otherwise than as a partner, the latter negative obligation may be enforced by injunction, although the former cannot be specifically enforced.

W. T. Levine et al. vs. *B. Michel*, 1121.

PETITORY ACTION.

In a petitory action where the defendant sets up no title to the property in himself, nor outstanding title in another, but merely denies the title of the plaintiff, plaintiff is not bound to show a perfect title against all the world to entitle him to recover.

This rule is subject to modification where the plaintiff offers evidence which shows an interest of the defendant in the property.

Mrs. A. Jamison vs. *P. Smith*, 609.

PHYSICIAN.

A graduate in medicine from the University of this State is not required to make and record an affidavit of having received his degree, in order to enable him to sue for his fees. The statute upon that subject applies only to those whose diplomas are from other institutions.

The charges of a physician for services cannot be determined solely upon the basis of skill. The amount of the patient's estate, and

PHYSICIAN—*Continued.*

his consequent ability to pay, also enter into the calculation and influence it.

Czarnowski vs. *Succession of Zeyer*, 796.

PLEADING.

An exception to the capacity of the plaintiffs to sue as liquidating commissioners of a bank comes too late after answer has been filed. It must be pleaded before issue joined.

J. A. Blaffer et al., Commissioners, vs. *Louisiana Nat. Bank*, 251.

An application by a plaintiff, whose petition has been dismissed because it disclosed no cause of action, for leave to amend his pleadings, comes too late and must not be entertained. 34 An. 328, reaffirmed.

Raymond et al., Commissioners, vs. *E. C. Palmer et al.*, 276.

The plea of discussion urged by a third possessor in an hypothecary action is a dilatory exception and cannot be pleaded after default, or in an answer after plea to the merits.

The plea of confusion is disposed of by Pipes vs. Norsworthy, 25 An. 559.

The demand on the debtor, required as a condition precedent to the hypothecary action, is not required to be made judicially.

The third possessor cannot urge objections to the title of his own author.

Boone et al., Executors, vs. *M. Carroll*, 281.

The plaintiff in a suit cannot be allowed, after issue joined, to amend his original petition, if the amendment alters the substance of his demand. Hence, in a suit against a railroad company for cattle killing, plaintiff cannot amend his petition for the purpose of alleging that the Company had no right of way over his lands. A railroad's responsibility, running trains under legal rights, is different from that of a trespasser.

Mrs. Day and Husband vs. *R. R. Co.*, 694.

A new trial will not be granted to a party who judicially admits his indebtedness on an account set up against him, on the ground that he had not seen the detailed account before rendition of judgment in the case, and that the items and dates of said account are newly discovered evidence.

His admission of the indebtedness estops him from subsequently denying knowledge of the account.

Prescription and compensation are not inconsistent pleas. Hence, the previous plea of prescription is not waived by a subsequent plea of compensation.

R. J. Looney vs. *Levy, Liquidator*, 1012.

PLEADING—*Continued.*

In an action by the State against a defaulting sheriff and his sureties for public monies collected and not accounted for, an averment that the monies collected belong to a particular class and were received within a stated period will be deemed sufficient. The State cannot be required to allege matters of details not within her knowledge. It would be exacting an impossibility. Exceptions to the vagueness of the demand are properly overruled.

State vs. *Gauthreaux et al.*, 1168.

PLEDGE.

A consignor or other person, who ships to his merchant or factor, to whom he owes a balance of account, cotton, sugar or other agricultural products, and who delivers the bill of lading or receipt therefor to the steamboat or other carrier, for transmission, can do no act which may affect or destroy the pledge flowing from such consignment, under the provisions of Act 66 of 1874.

Hence, the consignee's pledge cannot be destroyed or affected by a sale made of the consigned property "*in transitu*," by the consignor, who instructs the carrier to cancel and destroy the original bill of lading, to issue a new bill to another consignee, and to deliver the goods to a different order.

J. Phelps & Co. vs. *Z. Howell*, 87.

A pledge of bonds, stocks, notes, etc., made by delivery of them is valid, as well as against third persons as against the pledgor, if made in good faith.

Simulation of ownership of bonds and stocks may be shown by parol proof, as between the parties to the simulation.

Third parties, who have dealt with the apparent owner, cannot be prejudiced by the revelation of the real ownership, if they have acted in good faith.

Ribet, Agent, vs. *Bataille et al.*, 1171.

POSSESSION.

A proceeding by seizure and sale of land in the possession of third parties for more than thirty years, cannot have the effect of forcing them to assume the attitude of plaintiffs in a petitory action. Their position is that of defendants in such a suit. Until a better title be shown and recognized contradictorily with them, they can securely rely on their possession.

L. Lavedan vs. *F. F. Trinchard*, 540.

A possessor in bad faith is not entitled to remain in possession until the value claimed by him for improvements put upon the land, and which the former owner has been condemned to pay to him, has been reimbursed.

J. U. Payne vs. *T. C. Anderson et al.*, 977.

PRACTICE.

A default can be confirmed *two* judicial days after it is entered. The law does not allow the defendant the *third* judicial day after the taking of the default to file his answer, unless no confirmation has intervened. A judgment by default, which is confirmed on the *third* judicial day following the default, is seasonably rendered.

The appeal being frivolous, damages are allowed.

R. J. Taney vs. *J. S. Meilleur*, 117.

It is not enough for a party litigant or his attorney to place in the hands of the Clerk of Court a document which is to be filed. Such party or his attorney must see that the document *be actually filed* by the Clerk, or he must bear the consequences of the non-filing.

J. Ford and Wife vs. *Brooks, Constable*, 151.

Where a Judge, after overruling an exception to his jurisdiction *ratione materiæ*, renders a judgment on the merits of the case, without passing on that portion of the demand which it was claimed was not within his jurisdiction, this is virtually sustaining the exception, and the defendant has no occasion to complain.

On application for a certiorari and for a prohibition, the proceedings will not be annulled or restrained.

State ex rel. Smith Bros. vs. *Judge, etc.*, 738.

There exists no essential difference between a discontinuance and a voluntary non-suit. The latter does not interrupt prescription, whatever the intention to the contrary may appear. It is equivalent to an abandoment.

A plaintiff is entitled to make either, and the Court is bound to grant that made before judgment. However, when made and allowed, such motion cannot, in a case in which a reconventional demand has been made, destroy or affect the right of the plaintiff in reconvention to a prosecution and trial of his demand.

A plaintiff in reconvention has the right to oppose any such motion which would produce such effect.

Where the motion is allowed during the course of trial, the rights of the plaintiff in reconvention must be reversed, and where he insists upon it, the trial of his demand must be proceeded with as though the withdrawal had not taken place.

A. E. Davis vs. *C. Young*, 739.

Where objections to trial are based on alleged irregularities in ordering, making and submitting a report of experts, and there is no occasion to complain of the mode in which the same was made and returned, and where testimony shows the report to be correct, the ruling of the court will not be disturbed.

A rule, taken by experts to have their fees taxed, should have been

PRACTICE—*Continued.*

served on all the parties to the suit. Service on the plaintiff alone is insufficient. The judgment making such rule absolute, although repeated in the judgment on the merits, will prove of no effect.

State vs. *Gauthreaux et al.*, 1168.

PRESCRIPTION.

Ordinances of the City Council of New Orleans recognizing the claim of an attorney, who had been employed as special counsel of the City in important litigation, and providing for part payments of his fees, interrupt prescription on the claim.

J. McConnell vs. *New Orleans*, 273.

An action for rents and revenues of immovable property against an evicted possessor is barred by the prescription of one year, if the party evicted shows that he was a possessor in good faith.

Such an action can be maintained against the possessor only, and for the time of his occupancy.

It ceases against the first possessor from the time of his transfer to another party.

Succession of F. V. Gillespie, 779.

The hypothecary action against the third possessor is not barred by the prescription of ten years, when the principal obligation has been kept alive, and the mortgage securing it has been properly inscribed and reinscribed.

E. J. Smith vs. *W. W. Johnson*, 943.

An attorney's fees are due on the termination of the litigation, and prescription runs from that date. A continuity of services by an attorney, in other matters, from year to year, cannot interrupt that prescription.

R. J. Looney vs. *Levy, Liquidator*, 1012.

PRINCIPAL AND AGENT.

A party who takes an agency for the sale of mineral waters, for which he binds himself at a stipulated price, is not liable for the payment of a consignment of such goods shipped subject to his order by his principal, in the absence of an order for such consignment from the agent.

J. Frank vs. *F. Hollander*, 582.

An agent or debtor who is instructed by his principal or creditor to remit, without indicating any particular mode of remittance, and who does remit in the customary mode, is not responsible further.

If the same care, prudence and judgment is exercised in purchasing a Bill of Exchange for a remittance, as a prudent business man uses in the conduct of his own affairs, the unexpected failure of the banking

PRINCIPAL AND AGENT—*Continued.*

house drawing the Bill, before it can be presented, will entail no responsibility on the purchaser of the Bill.

The payee of a bill is estopped from holding its agents or debtor, who purchased it under instructions, responsible, after he has elected to treat the bill as his own and received a dividend upon it.

Wrecking Co. vs. *Underwriters et als.*, 803.

A cotton factor who, by direction of his customer, invests the latter's funds, is not responsible to him for illegality of the investment.

Allen, West & Bush vs. *Whetstone et al.*, 846.

Where the practice or custom of a factor is to insure consignments of produce, and this is brought to the knowledge of his consignor by uniform charges for insurance in his accounts rendered, the factor will be deemed to have continued that custom until he gives notice to the consignor of the change, and is responsible for any loss, consequent upon his failure to insure, before such notice reaches the consignor.

If the factor has been in the habit of insuring produce without instructions, and he deviates from it without apprising his consignor, and loss ensues, he will be liable.

Area & Lyons vs. *Milliken*, 1150.

An invalid contract by an agent will be held as ratified by the principal, after a tacit acquiescence and a long silence.

This rule applies to a sale of stock made by a pledgee, which, though invalid in itself, is confirmed by a settlement, under such sale, subsequently made between the pledgor and the pledgee.

Lafitte, Dufilho & Co. vs. *Godchaux*, 1161.

The power to compromise and to sell property implies, that of giving it in payment of a just debt of the principal. What the agent could have done indirectly, he can accomplish directly.

F. A. Darling vs. *Lehman, Abraham & Co.*, 1186.

PROHIBITION.

A prohibition does not lie to arrest the execution of a judgment rendered by a court vested with jurisdiction over the subject matter.

A suspensive appeal from a judgment dismissing, on exceptions, the intervention of an adjudicatee contemplating the erasure of mortgage inscriptions, does not strip the court of jurisdiction over a demand to coerce payment of the price of adjudication retained by such adjudicatee at a judicial sale.

Where the judgment rendered is erroneous and aggrieves the adjudicatee and is such as could not have been legally rendered without notice to him, and he was not properly made a party, the law does

PROHIBITION—*Continued.*

leave him without a remedy to suspend or arrest the execution of such judgment.

The writ of prohibition is not designed to stay the enforcement of such judgment.

State ex rel. Moses Lobe & Co. vs. *Judge, etc.*, 236.

A prohibition is not a writ of right and issues only in the sound discretion of the court.

It does not lie to prevent a District Judge from entertaining jurisdiction over a suit for an injunction to arrest the execution of a *fi. fa.*, issued by a court of a different territorial jurisdiction against a party to the suit, domiciled within the jurisdiction of the first Judge, where, under the force of circumstances, it becomes necessary to ward off an immediate injury, otherwise unavoidable.

The rule that each court controls the execution of its judgment is subject to such an exception in favor of both the party cast in the suit and of third opponents.

State ex rel. Osborne vs. *Judge, etc.*, 538.

PROVISIONAL SEIZURE.

A writ of provisional seizure was properly dissolved where the lessee offered to deliver cotton to the lessor, then in the ginhouse, sufficient to pay the rent, or to give a draft for the same, the offer being made on the day the rent fell due.

Nor is the lessor entitled to the writ for the value of the repairs which the lessee failed to make, where no demand for any specific amount was made on this account, and where it appears from the contract of lease it was stipulated, that on the payment of money rental the lessee was authorized to ship or dispose of his crop.

S. D. Browne vs. *J. W. Clarke*, 290.

PUBLIC OFFICERS.

The Superintendent of Public Education has no authority in law to appear in person or by private counsel in any suit or other legal process in which he may be a party or interested in his official capacity, but must be represented by the Attorney General or local District Attorney. Any suit instituted by such a ministerial officer in his official capacity, by a private counsel, shall be dismissed by the court *ex proprio motu*, or on motion. Act No. 21 of 1872.

Fay, Superintendent, etc. vs. *Auditor, etc.*, 368.

Act No. 178 of 1867, entitled, "An Act to establish the office of Inspector of Hay, and to regulate the duties pertaining to same," created but one office with three persons to perform the functions thereof. Hence, the emoluments of said office, consisting of fees,

PUBLIC OFFICERS—*Continued.*

must in law be equally divided between the three Inspectors composing said office. The action of two of the Inspectors for the purpose of compelling the third Inspector to account for the inspections and collections made by him is a joint action, in which plaintiffs properly joined in the same action.

W. E. Clark et al. vs. *P. H. Waters*, 451.

A police jury has the power to remove a treasurer appointed by it.

There exists no antagonism between R. S., Sec. 2743 and Article 201 of the Constitution. The right of removal delegated by the statute was not abrogated by the Article. The constitutional provision relates to certain parish and municipal officers elected by the people or appointed by the Executive, and does not apply to subordinate functionaries chosen by a police jury.

E. Richard vs. *J. Rousseau*, 933.

RECONVENTION.

A plea in reconvention must be established with legal certainty. Hence, a party who receives a consignment of perishable goods, without examination and inspection at the time of delivery, and who discovers two months later the inferior quality or damaged condition of the goods, cannot recover in reconvention the price paid for such goods, by the reason of his failure to learn the damaged condition of the goods when delivered.

J. Frank vs. *F. Hollander*, 582.

RECUSATION.

When a party to a suit, fully aware of the relation which the Judge bears to the cause, as exhibited by his own pleadings, fails to recuse him, and submits his cause for determination, he will not be heard, after judgment, to assign the incompetency of the Judge as a ground for new trial. In this case there was no ground for recusation of the Judge.

W. A. Ricks et al. vs. *E. Gantt*, 920.

REDEMPTION.

Where a sale is made with the right of redemption, and the term expires within which the price is to be returned, it is not required that the purchaser should have the failure to redeem judicially declared before he can become or be regarded as the absolute owner of the property. No divestiture of the right of redemption results unconditionally from the default of the seller.

Leasing the property by the vendor after the time for redeeming has passed, in the absence of error or fraud, concludes him from assert-

REDEMPTION—*Continued.*

ing title thereto. When after the sale the vendor continues to occupy and cultivate the land, and the purchaser to furnish supplies, payments made by the former to the latter, with or without agreement to that effect, must be imputed to the privilege for such supplies.

Where parties have the legal capacity to contract, mere ignorance on the part of one of them, and inability from such cause to understand the contract, after it is read to him, is not sufficient ground to avoid the same.

P. Jackson vs. *Lemle et al.*, 855.

The burden is on the vendor, in a sale with the pact of redemption, to prove that the contract was one of mortgage or of *antichresis*, when possession was given to the purchaser.

Written evidence alone is admissible between the parties, when fraud or error is not alleged.

Interrogatories may be propounded to the vendee, but his answers, uncontradicted by written evidence, showing the reality of the transaction, will conclude the vendor.

If not exercised within the delay agreed, and according to the terms of the contract, the right of redemption will be considered as forfeited.

O. F. Mulhaupt vs. *P. Youree*, 1052.

REGISTRY.

Registry of act of sale under private signatures is binding as notice to third persons, though without proof of signatures, as directed by Rev. C. C. 2253.

A party to a written contract cannot avail himself of error resulting from failure to read the same before signing, where not induced to do so by the other party thereto.

Allen, West & Bush vs. *Whetstone et al.*, 846.

REMOVAL TO U. S. COURT.

An appeal lies from an order of the District Court removing a cause to the U. S. Court.

Such appeal can be taken by motion in open court as appeals are taken from other judgments.

The enforced appearance of the appellant from such order in the U. S. Court, pending such appeal, is not an acquiescence in, or voluntary execution of, the judgment or order appealed from.

Only suits involving rights depending upon a disputed construction of the Constitution and laws of the United States are removable from the State to the National Courts under the words of the Act of Congress, "arising under" that Constitution and those laws.

REMOVAL TO U. S. COURT—*Continued.*

There must be some question actually involved in the case, depending for its determination upon the the correct construction of the Constitution, or some law of Congress, or treaty, in order to sustain the Federal jurisdiction under the clause containing those words.

When the interest of one or more parties to a suit is so bound up with the others, that its legal presence as a party is an absolute necessity, it is an indispensable party, and must be so considered on an application to remove the whole suit.

Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different States, has not provided for the removal from a State Court of a suit in which there is controversy not wholly between citizens of different States, and to the full or final determination of which one of the indispensable parties on the side seeking the removal is a citizen of the same State with one or more of the parties against whom the removal is sought.

New Orleans vs. *H. O. Seixas et als.*, 36.

An order refusing the removal of a cause from a State to a Federal Court, is an interlocutory decree, which cannot work irreparable injury and is, therefore, not appealable.

Succession of Bodenheimer, 1033.

RES JUDICATA.

A judgment rendered by a competent court, in an action for the nullity of a previous judgment rendered by the same court, is *res judicata* of the grounds alleged in nullity, and will be a bar to an application by the same party to a writ of *certiorari* in the Supreme Court, with a view to annul the same judgment on the same alleged grounds of error.

State ex rel. Marrero vs. *Judge, etc.*, 214.

An allegation made by a party defendant in answer to suit, but not considered by the court or disposed of in the judgment, cannot support the plea of *res judicata* when it is made the basis of a suit by the same party against one of his co-defendants in the previous suit.

N. Hoggatt vs. *V. Thomas et als.*, 298.

A judgment, affirmed on an appeal, recognizing a homestead right under Sec. 1691 *et seq.* R. S., constitutes *res judicata*. It continues in force until set aside. As long as it remains in force the property cannot be legally seized, and the sale can be enjoined.

Objection to the introduction of evidence under an answer to the injunction suit, averring a state of facts different from that in exist-

RES JUDICATA—*Continued.*

ence when the judgment was rendered, is well taken and the proof must be excluded.

Damages claimed for such seizure cannot be allowed.

Mrs. M. M. Calvit vs. *J. A. Williams*, 322.

Judgments of homologation of accounts in insolvent successions, directing a distribution of funds, do not invariably constitute *res judicata*, so as to prevent a review of the distribution and directions for a different one.

Succession of M. Coughlin, 343.

An *ex-parte* order of a court recognizing a party as testamentary heir of an absentee and putting him in possession as such, is not *res judicata* as to third persons, and may be collaterally questioned when offered as the title in virtue of which property is claimed and the rights of third persons sought to be disturbed. A party claiming as testamentary heir must find the rights in the will, and not in the *ex-parte* order of a court.

S. Dalton vs. *R. C. Wickliffe*, 355.

An *ex-parte* order of court recognizing one as heir of deceased person and putting her in possession of his succession, lacks the essential elements of the thing adjudged and cannot be pleaded as *res judicata*.

An *ex-parte* order of court, such as hereinbefore described, is not such "title" as will enable the party who obtained it to plead the prescription of ten years under color of title against an attack of creditors of the deceased.

Succession of J. A. Lampton, 418.

It matters not under what form, whether by petition, exception, rule or intervention, the question be presented, whenever the same question recurs between the same parties, the plea of *res judicata* estops. Hence, a judgment maintaining an exception of no cause of action, urging that plaintiff prays for relief, which cannot be granted according to law, will support the exception of *res judicata* to a petition disclosing the same cause of action between the same parties and for the same relief.

W. E. Sewell vs. *J. H. Scott*, 553.

The heirs of a deceased testator sue to recover his estate from the universal legatees, alleging that the last will of the deceased was null and void for certain causes of nullity which are set forth in the petition.

Judgment is rendered decreeing the will valid, and the title of the universal legatees, or of those holding under them, to the estate sued for, a good one, the latter having been made parties to the suit.

RES JUDICATA—*Continued.*

After this decision another suit is instituted by the legal heirs against the executors alone, propounding the same causes of nullity as before, and praying that the order probating the will be annulled and set aside, and the will declared null and void. The owner of the estate, by title derived from the universal legatees, who was a defendant in the former suit, intervenes in this last suit and resists the pretensions of the plaintiffs on the same grounds as before.

Held, that the judgment in the first suit could be pleaded as *res adjucata* to the demands of the plaintiffs in the last or present one, and that this plea was properly sustained.

Heirs of Hoover vs. *Hoover, Executor*, 573.

RESPITE.

On an application for respite the usual order staying proceedings against person and property is lawful and competent.

The court granting such order has power to enforce it, and to annul and set aside acts done in violation thereof.

The privileged creditors who, under Art. 3095, C. C., are excepted from the operation of respite proceedings, are those whose privileges result from the nature of their debts. It does not include privileges resulting merely from seizure. 24 An. 359.

Widow de St. Romes vs. *Creditors*, 801.

A forced respite cannot be attacked collaterally by a creditor, on the ground that the debtor has violated the terms thereof.

Such a respite resulting from a judgment must stand and remain in full force, until avoided or set aside in a direct action.

T. C. Anderson vs. *Duson, Sheriff*, 915.

REVIVAL OF JUDGMENT.

As long as executors have not been discharged, they are amenable to a suit to revive a judgment obtained against the deceased testator.

The cancellation in part of the judicial mortgage, securing the judgment as to stated real estate, does not amount to the extinguishment of the judgment sought to be revived. The security may be abandoned or lost, but the debt continues to exist until extinguished. Such defenses can only be urged in an hypothecary action.

In a suit to revive, the only questions are, was a judgment rendered; was it extinguished, and if not, is the suit to revive in time?

Mrs. Beall vs. *Succession of Elder*, 1022.

REVOCATORY ACTION.

In an action by the transferree of a judgment against a judgment debtor, the latter will not be heard in charging the simulation and nullity of the transfer by the original creditor to the transferree, unless he shows not only that there was fraud between the contracting parties, but that he was injured thereby.

To succeed in such a defense, the complainant must base his attack on the allegations and the proof required by our law of a complaining creditor in an action of revocation, or in declaration of simulation.

F. Long vs. *J. A. Klein*, 384.

Though the vendor was in fraud, when the purchaser paid a sound price, and is not shown to have been cognizant of the fraud of the vendor, or of the fact of his insolvency, the property cannot be reached, even through a revocatory action.

Where the property of the innocent purchaser has been thus illegally seized and sold, the party in fault is liable to the owner for the full value of the property, although part of the proceeds of the sale has been applied to pay a debt for rent due on the property in favor of a third person claiming same by third opposition. 6 R. 385.

L. Kee & Co. vs. *Smith Bros., etc.*, 518.

SALE.

The sale of a commercial establishment, together with the good-will thereof, does not preclude the vendor from the right of opening a similar establishment in the same vicinity within a short time after the sale, in the absence of an express understanding or stipulation, under which the vendor had obligated himself not to engage in or pursue a similar business within a limited space or for a specified time. Good-will is a proper subject of trade, bargain and sale; but in a sale of good-will, courts cannot imply the additional contract or obligation not to do business on the part of the vendor.

The doctrine finds its support in authorities under the Civil Law as well as under the Common Law.

D. Bergamini vs. *B. M. Bastian*, 60.

A vendor of cotton is entitled to have the sale annulled for non-payment of the price when vendee is in actual or constructive possession.

The fact that the vendee has delivered the cotton to a creditor of his, the proceeds to be applied to the payment of his debt, cannot be set up by such creditor to justify a claim to the ownership of the cotton.

The ownership did not thereby pass. It continued in the vendee, at

SALE—*Continued.*

whose risk the thing remained. The creditor's possession, after such delivery, is that of the vendee.

Such a transaction is not a *dation en paiement.* A consent, a price and delivery were necessary, but a weighing was not indispensable.

Where special defenses are not set up, the Court cannot supply them.

Allen, Nugent & Co. vs. *Ben. Buisson*, 108.

Where one firm buys cotton with funds furnished by another, which, under the agreement, is to be entitled to the cotton from the date of the purchase, the bills of lading for the cotton with the exchange drawn against it, to be delivered to the firm furnishing the funds, that firm is entitled to cotton thus purchased, in hands of the firm making the purchase.

That right cannot be defeated by the death of one of the partners of the firm purchasing the cotton, and the delivery of the cotton on hand when the death occurs, to the firm with whose funds it was purchased under the agreement stated by the surviving partners, is valid.

The receiver of the partnership, subsequently appointed, cannot disturb such a delivery.

An exception to one's capacity to sue must be pleaded before issue joined.

Legendre, Receiver, vs. *Seligman, Hellman & Co.*, 113.

The law does not and cannot sanction or maintain a sale of property by the original owner or by his vendee during the pendency of a revocatory action instituted by a creditor of the original owner, seeking to avoid, in its effect as to him, an alleged fraudulent sale of the same property by his insolvent debtor.

The property thus claimed to be liable for the payment of his debt by a creditor cannot be alienated pending his action so as to prejudice his right.

New Orleans vs. *A. Marchand*, 222.

Where a sale of goods and merchandise is real and not simulated, and delivery has been made, a creditor of the seller must attack and annul the sale as in fraud of his rights, before he seizes the goods to satisfy his judgment against the seller.

T. J. Majors vs. *Dennis, Sheriff*, 336.

SEQUESTRATION.

The fact that a party to the suit requests it, does not deprive the court of the power to order *ex-officio* a judicial sequestration without affidavit or bond.

Allen, West & Bush vs. *Whetstone et al.*, 846.

A release bond, furnished to set aside a sequestration, in furtherance

SEQUESTRATION—*Continued.*

of an order made on the petition of one claiming to be the agent of the plaintiffs, and represented to be such by the counsel of the latter, will be considered as the deed of the plaintiffs, when signed by such party in their behalf.

In default of a delivery of the property released on such bond, after judgment declaring it to belong to the defendant, the plaintiffs, as principals, and their surety, will be held responsible for the value of the same.

H. Materne vs. *Lion et al.*, 988.

SERVITUDES.

Where the owner of two lots, with buildings on them, sells one of them, and between them an apparent sign of servitude, such as windows, exists, and the deed of sale is silent respecting the servitude, it shall continue to exist in favor of the lot which has been sold.

The circumstance that the blinds to the windows were closed and boards nailed across them at the time of sale, and had been continuously for many years, will not change the apparent servitude, or extinguish it. In order to constitute an extinguishment of it, the works erected to present an obstacle to the exercise of the servitude must be of a permanent and solid kind, and the obstacle thus presented must be absolute. Non-user of a window, or inability to use it because of obstructions apparently temporary, will not be a release or extinguishment of the servitude.

Water pipes, gutters, iron staples driven into a wall, and such like, will constitute a servitude upon one lot in favor of another lot, when erected by the owner of both and used during his ownership, and this apparent servitude will continue upon the lot owing it after it has been sold.

Screens erected on a lot, which obstruct the view over it from the house on an adjoining lot, but do not impede or prevent the opening of the window shutters in such house for the enjoyment of so much light and air as can be had by the opening of the shutters merely, are not an obstruction to the enjoyment of the servitude of the windows, which can be successfully complained of.

M. Taylor, Wife, etc. vs. *A. Boulware*, 469.

SLANDER OF TITLE.

In an action for slander of title the verity and sufficiency of plaintiff's title is not at issue. The action admits of three defences: 1st, denial of plaintiff's possession; 2d, denial of the slander; 3d, admission of the slander. In the last case, if the admission of the slander be unaccompanied with averments of better title in

SLANDER OF TITLE—*Continued.*

defendant, the judgment shall be one ordering the latter to bring suit within delay fixed and establish his pretensions; but if the defendant accompany his admission with averments of his own title, the court may proceed to investigate said title in the same action, in which case defendant becomes the actor, with the *onus* on himself, and bound to succeed on the strength of his own title, and not on the weakness of his adversary's.

S. Dalton vs. *R. C. Wickliffe*, 355.

SUCCESSIONS.

In a succession where the deceased has left heirs of age and a minor heir, and in which he left a will, making special legacies of movable and immovable property, and appointed testamentary executors, the heirs of age cannot dispossess the executors, before an inventory is completed, and a tutor is legally qualified for the minor heir, and thus avoid an administration. In such a case, the distribution of the legacies is an act of administration which must be performed, as indicated in the will, by the testamentary executors, and an administration therefore becomes necessary.

Succession of Mrs. T. Baumgarden, 127.

Where the *mortuaria* proceedings in a succession show a full administration, closing with the putting in possession of the legatee or testamentary heir, and the discharge of the succession representative, the proceedings cannot be reopened and another administration inaugurated.

Articles 1067 *et seq.* of the R. C. C. have reference to successions actually under administration and not to such as have been thus wound up. They were intended for the protection of new, or straggling creditors, not previously known.

C. Atkinson vs. *Mrs. E. Rodney et als.*, 313.

Where a judgment is rendered striking out an unproved item on the passive side of a succession account and adding the amount to the balance previously struck, for distribution among ordinary creditors, and where, before such distribution has taken place, the creditor whose claim was disallowed for want of proof has established the same by sufficient evidence, the distribution first ordered must be modified and the proved claim ordered to be paid.

Creditors who have been paid in conformity with a decree of distribution, in case of deficiency can be compelled to refund the proportion which they are bound to contribute, in order to give new creditors an equal part.

SUCCESSIONS—*Continued.*

The doctrine in the Succession of Warren, 4 An., requiring proof in insolvent estates, in addition to notes held by creditors, must not be carried too far.

Succession of M. Coughlin, 343.

An universal legatee, who has also qualified as executrix, and who, in a proceeding to compel her to give bond, has appeared and been condemned as executrix, and, on failing to furnish bond, has been destituted, is bound to render an account as executrix to her successor duly appointed, and cannot, in a proceeding for that purpose, be permitted to deny her quality as executrix, and set up that she had accepted unconditionally as universal legatee and had held the estate, not as executrix, but as owner.

Succession of J. Frazier, 381.

Where an application is made for the appointment of a curator, administrator, or dative testamentary executor, notice of the application should be published for ten days in the manner prescribed by law. If no opposition is made thereto, and this fact is made known to the Judge, he should thereupon make the appointment, upon the applicant giving the required bond and taking the prescribed oath. Before such appointment is made a tender of a bond is premature; and the appointment of another party upon an allegation that the first applicant had failed to give a sufficient bond, is illegal, where such first applicant had never been appointed, and where only the notice of his application had been published.

Notice of such application must precede the appointment.

Where an appointment has been made and the party fails to qualify in ten days thereafter, the appointment is vacated.

Succession of Mrs. T. P. Gusman, 404.

A man dies intestate, leaving an estate consisting of property held in community with his wife, who survives him. The wife soon after dies, leaving a last will. The major heirs of the husband obtain an order putting them in possession of his estate, consisting of his interest in the community. *Held*, that the testamentary executors of the wife's will, and the tutor of a minor heir of the two deceased spouses, had an interest in said order sufficient to entitle them to an appeal therefrom.

A husband dies intestate, leaving three heirs of age and one minor, the issue of his marriage with the wife who survives him, to an estate held in community with the surviving wife. The wife shortly after dies, leaving a last will and appointing a tutor to the minor child of herself and deceased husband. The executors of the wife

SUCCESSIONS—*Continued.*

and the tutor of the minor child, there being no debts except the debt of the husband's succession to the succession of the wife, have no right to oppose the putting into possession of the heirs of age to the extent of their interest in the succession of their father. If any inconvenience or confusion is caused thereby, it can be promptly adjusted by a partition among the heirs. The minor heir cannot be prejudiced by such proceeding, and his tutor is without interest to oppose.

Succession of N. A. Baumgarden, 675.

The administrator of a succession is responsible for the difference of the appraised value of movable effects and the price which they brought at a sale on a second offering made on the same day on which the first offering was made, when such sale was made for what the property would bring, without reference to appraisement.

No law in this State compels the administration of a succession to lease its property at auction.

An administrator who acknowledges in writing a claim against a succession, and places such a claim on his first tableau, will be estopped from afterwards contesting such claim, unless he pleads and clearly proves that he had acted through error, caused by the fraud of the creditor.

Succession of W. L. Richmond, 858.

Oppositions to accounts of administration may be filed after the expiration of legal delays of the public notice, provided they be filed before the homologation of the account.

All payments made by an administrator without the order of the court are unauthorized and are made at his own risk.

Clerks in the District Courts have no authority in law to prove tableaux of debts, or homologate accounts of administration, or to authorize the payment of debts by administrators. Act 106, 1880.

Succession of G. W. Price, 905.

There is no provision of our law that forbids an administrator from buying property mortgaged to pay a succession debt, and where the proceedings are regular and free from the imputation of fraud, and the sale has been followed by an undisturbed and continuous possession of more than ten years, the purchaser is protected by prescription.

Nor will the fact that the sale was made upon a mortgage note due the succession, which was credited with the amount of the adjudication, vitiate the sale if the administrator charges himself in his account with said amount.

W. L. Sojourner vs. *E. A. Fourney*, 918.

SUCCESSIONS—*Continued.*

Where an administrator suffers a valuable plantation, mortgaged to the succession, to be sold for taxes for a nominal sum and buys it in through one of the heirs interposed, who subsequently sells it, but the entire price—cash and credit—goes into the hands of the administrator, such purchase and sale enures to the benefit of the succession. And where two of the notes representing part of the price are delivered by the administrator to an heir who sues thereon, a creditor of the succession may intervene and have said notes declared the property of the succession.

E. & E. Thomas vs. *N. Bienvenu*, 936.

The *légitime* of a father or mother, or both, in the testamentary succession of a child deceased without posterity, is *one-third* and not *one-fourth*, and this to the exclusion of brothers and sisters. The disposable portion in such a case being two-thirds only. Cole vs. Cole, 7 N. S. 414, overruled.

Succession of J. Marks, Jr., 993.

SUPREME COURT.

Where the value of a succession is less than one thousand dollars, this Court has not jurisdiction to entertain any question relating thereto. The amount of the claim preferred against the succession is not the test of jurisdiction, but the fund to be distributed.

Succession of Susan B. Thomas, 19.

The jurisdiction of this Court attaches to a suit in which one thousand dollars and interest and five per cent. attorney's fees thereon are claimed. The fees do not grow out of the capital and are no interest thereon. They constitute a distinct item of indebtedness.

Mrs. M. Mayer vs. *L. Stahr*, 57.

Where an administrator charges himself with $1500 in his account, as the result of a compromise of a twelve months' bond in favor of the succession, and prays that such compromise may be approved by the court, such demand gives this Court jurisdiction of an appeal from a judgment rendered on an opposition to the account, although the cash fund proposed to be distributed by the account and the amount of the inventory of the succession is less than $1000.

State ex rel. Muse vs. *Judge, etc.*, 215.

A case having been ordered to be stricken from the docket of the Supreme Court under the erroneous impression that the record contained no order of appeal will, on proper showing, be reinstated, as the order complained of is not a final decree in the cause.

S. D. Browne vs. *J. W. Clarke*, 290.

SUPREME COURT—*Continued.*

In an action of boundary by the owner of unimproved lands, the only matter in dispute is the value of the lands included between the two contested boundary lines, and unless appellant shows that the value of such lands exceeds one thousand dollars, the Supreme Court is without jurisdiction and the appeal must be dismissed.

S. Lombard et al. vs. *H. F. Belanger et als.*, 311.

In Teal vs. Pirtle, 34 An. 892, we held that, where in an action for account, the plaintiff alleged a certain sum as the amount which he claimed as due to him, that allegation fixed the limit of his demand. In this case the plaintiff claims $1100 as the amount due him on proper accounting, for which he prays. The defendant answers, admitting $173 as due. The difference, $927, is the only *amount in dispute*, and excludes our appellate jurisdiction. 33 An. 1089; 26 An. 291.

H. Denegre vs. *P. S. Moran*, 346.

The test of jurisdiction of the Supreme Court in a suit by injunction, when the writ is obtained by the judgment debtor, who is the owner of the property seized, is the amount of the judgment injoined. *Aliter*, when a third person obtains the writ to prevent the sale of his own property to pay a judgment against another.

F. Francisco vs. *Gauthier, Sheriff, et als.*, 393.

Where the nullity of a tax sale is decreed and case remanded to ascertain amount of taxes paid by the evicted purchaser and the value of improvements made by him, for which reimbursement is claimed by reconventional demand, and the case is again tried on this remaining issue, and a second appeal taken; *held*, that this Court is without jurisdiction where the amount of such reconventional demand does not exceed $1000.

On the merits: same as in preceding case 8820.

E. Davenport et al. vs. *N. K. Knox et als.*, 486.

The alleged value of the property in dispute, contained in a supplemental petition filed by plaintiff, will be the test of the amount in dispute in the controversy, even when a larger amount had been alleged in the original petition.

In cases arising since the organization of the present Courts of Appeal, the Supreme Court has no authority to transfer to such tribunals cases which are not of a sufficient amount to vest jurisdiction in this Court.

H. Groebel & Co. vs. *L. Ristroph et als.*, 490.

Where the allegations of neither party disclose that the amount in dispute exceeds one thousand dollars exclusive of interest, the Court will dismiss the appeal *ex proprio motu*.

C. Gross vs. *P. Herman*, 496.

SUPREME COURT—*Continued.*

A judgment rendered by a Circuit Court of Appeals in a case within its jurisdiction is final and cannot be reviewed by the Supreme Court.

Hence, in such a case, this Court will not interfere with the proceeding of the Circuit Court, when, in an appeal pending before it, the papers are destroyed by fire, and the Court sets aside the judgment appealed from and remands the cause to the District Court to be tried *de novo*, with the view to reinstate the pleadings, the evidence, and other papers in the case.

The Supreme Court will decline to pass on the correctness of such a ruling.

D. C. Brown vs. *E. M. Ragland*, 837.

When, in a case unappealable to this Court on the main demand, but appealable on the reconventional demand, the verdict of the jury is for a "balance," and the judgment upon it is in accordance, this Court cannot review the merits of the controversy between the litigants without unavoidably considering the main case. It can neither affirm nor reverse the judgment for correction or incorrectness.

There should have been two findings and, if correct, the judgment should have been in consonance.

The District Judge found the verdict erroneous, and should have granted a new trial.

J. M. Defee vs. *C. D. Covington*, 886.

This Court has no jurisdiction over an opposition to an executor's account when the amount claimed is less than one thousand dollars, and there is no other fund to be distributed. Succession of Duran, 34 An. 585, affirmed.

Succession of E. McDowell, 1025.

When the Supreme Court is not in session, an application for any of the remedial writs may be entertained by the Chief Justice or any of the Associate Justices.

A provisional order for any such writs thus issued by any one of the Justices is valid and binding, as though it had emanated from the Court.

Such an order is not a judgment; it is valid without the concurrence of the majority of the Judges, and need not be supported by reasons.

State ex rel. Behan, Mayor, et al. vs. *Judges, etc.*, 1075.

Under its supervisory jurisdiction, the Supreme Court will entertain a *writ of certiorari* against a justice of the peace, for the purpose of ascertaining the validity of his proceedings in an unappealable case. If, on examination of the proceedings, it appears that the magistrate has rendered judgment against the relator without

SUPREME COURT—*Continued.*

giving him a hearing according to law, the judgment thus rendered will be annulled and avoided.

State ex rel. Montague vs. *Justice, etc.*, 1101.

In an injunction suit to prevent the continuance of the acts complained of, plaintiffs alleging that those acts, if persisted in by defendant, will cause them more than $2000 damages, this Court has jurisdiction of the case.

W. T. Levine et al. vs. *B. Michel*, 1121.

It is only where the inferior Judge exceeds the bounds of his jurisdiction, or is guilty of an usurpation or abuse of his authority, that this Court, under the rules heretofore propounded, will interpose its supervisory powers.

So, where a person is sued personally for an amount within the jurisdiction of the court and seeks to avoid a personal liability, by pleading that the act or omission complained of, if done at all, was in his capacity of syndic of an insolvent estate then being administered in the District Court, which court, it is averred, has sole jurisdiction of the demand, and the plea is overruled and judgment rendered against the defendant personally, this Court will not interfere.

The plea in avoidance and its legal effect was a proper matter for the determination of the Judge.

E. W. Troegel vs. *Judge, etc.*, 1164.

SURETY.

An agreement by which one of two sureties on a bond binds himself to hold his co-surety harmless from any liability or loss on account of the bond, is not a promise to pay the debt of a third person, or a contract of suretyship; it forms no part of, but is distinct from the bond executed by the parties; it is an original contract between the parties, a contract of general indemnity from the obligor to the obligee, and as such it can be proved by parol testimony.

N. Hoggatt vs. *V. Thomas et als.*, 298.

Under Section 3724, Rev. Statutes, action does not lie against the surety on an administrator's bond "until the necessary steps shall have been taken to enforce payment against the principal." Mere testimonial proof of the principal's insolvency, in absence of judicial determination of that fact or liquidation of the claim contradictorily with him, will not excuse non-compliance with this condition precedent.

F. Gaillard vs. *Widow Bordelon, etc.*, 390.

Solidarity of obligation is not a prerequisite to the possession or exercise of the right of a surety to enforce contribution. The neces-

SURETY—*Continued.*

sary conditions are that the persons must have been sureties for the same debtor, and for the same debt, and the surety who is demanding contribution must have paid in consequence of a lawsuit.

The terms of the Code do not presuppose a joint liability to a common obligee which has been discharged by one of the joint obligors, but the presupposed liability may be several as well as joint.

The party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by him who demands the contribution.

E. F. Stockmeyer vs. *H. Oertling*, 467.

In a suit against a defaulting Parish Treasurer and his sureties for funds embezzled by him, the sureties cannot set up as a defense the nullity of the Treasurer's bond, predicated on the failure of the members of the Police Jury who elected him to have taken the oath required by law within the prescribed time. That question cannot be raised in this collateral manner.

St. Helena vs. *Burton et als.*, 521.

A surety on a judicial bond must not only be solvent, but must be good for the amount of the bond.

The burden of proving such capacity is on the party who tenders the surety.

State ex rel. Holyland vs. *Judge, etc.*, 737.

When two bonded employees of a bank are parties to a joint trespass, resulting in a loss to the Bank, thereby violating the conditions of their respective bonds, three groups of solidary obligations arise, viz: those of each employee and his respective sureties, and that of the two co-trespassers with regard to each other. But the members of these respective groups are not bound *in solido inter esse* beyond the limits of their own group.

Where the relations above indicated result from the facts set forth in the petition, the allegations of solidary liability will be construed with reference thereto.

The discharge of the sureties on one bond would not operate the discharge of the principal or sureties on the other bond.

Payment of the loss by the principal or sureties on one bond would not entitle them to subrogation to the rights of the Bank against the sureties on the other bond.

What rights payment by the principal or sureties on one bond might give them against the principal on the other, as a co-trespasser, need not be determined, because said principal does not appear to have been discharged. The discharge of his sureties, although bound *in solido*, did not discharge such principal.

Union Bank vs. *Legendre et als.*, 787.

SURETY—*Continued.*

On a rule against a surety on a bond for a suspensive appeal from a money judgment, which was affirmed, the exigencies of the law are satisfied where the writ issued is seasonably returned *nulla bona*, after demand from the parties and their failure to point out property.

Where the defendant in rule avers that the defendant in writ owns real property in excess of plaintiff's judgment, subject to execution and not encumbered to his prejudice, which was pointed out, the burden is on him to prove the existence of such property, the title of defendant to it, its non-alienation and that, if seized, it will realize or net an amount sufficient to pay the judgment in whole, or reasonably in part.

A judgment creditor is not bound to seize burdened property pointed out, when the attempt to sell would only result in costs, before proceeding against the surety on the appeal bond.

The decision on appeal of the rule against the security cannot be retarded on the statement made in the brief, that since the judgment below against the security the plaintiff has levied on property of the defendant, the sale of which was enjoined and the matter being on appeal. The appellate court is not bound to wait until the determination of such suit, still less until after it is ascertained whether the writ has or not realized or netted anything.

L. Folger vs. *E. C. Palmer*, 814.

An action lies to annul a money judgment against a surety on a sheriff's bond, when it is proved that since the joining of issue, the surety had paid, under judicial compulsion, the full amount for which he had signed the bond. Marcy vs. Praeger, 34 An. 54, affirmed.

J. A. Florat vs. *Handy et al.*, 816.

The prescription of the action against the surety of an administrator does not run from the date of the bond, but only from the time when the right of action against the surety arises, that is, after judgment and other "necessary steps" have been taken against the principal.

When judgment against the principal has been obtained, execution issued and returned *nulla bona*, and insolvency of principal established, no other steps are necessary to justify recourse against the surety.

The liability of the surety is limited by the amount of his bond. When the amount is left in blank in the bond, the law fills the blank with the amount fixed by itself, to-wit: one-fourth over the amount of the inventory, bad debts deducted.

SURETY—*Continued.*

Interest runs on the amount due by the surety from the time when it became due and demandable, viz: after the taking of the necessary steps against the principal.

W. A. Ricks et al. vs. *E. Gantt*, 920.

Sureties, who have already made payment on account of the sums for which they have subscribed a sheriff's bond, are entitled to credit, and can be held for the difference only.

State vs. *Gauthreaux et al.*, 1168.

TAXATION.

Exemptions from taxation are always strictly construed against the exemption. Nothing can be supplied by intendment or inference.

The exemption of buildings and property used exclusively for colleges, or other school purposes, means such buildings as are used for the habitation of a college or school, and such property as is used in and for college or school purposes, such as chemical or philosophical apparatus, and such like.

Neither buildings, nor property of any kind, that is used for revenue or profit, although the revenue is to be applied wholly to the support of a college or school, and the profit is to be expended solely for its benefit, is exempt from taxation under our present Constitution.

State ex rel. Tulane Fund vs. *Assessors*, 668.

Persons engaged in rice milling are manufacturers, and as such are exempt from license under Article 206 of the Constitution.

New Orleans vs. *Ernst & Co.*, 746.

There exists no legislative authority for the assessment or levy of an income tax, under the existing revenue and assessment laws.

B. R. Forman vs. *Assessors, etc.*, 825.

Where a parish has levied an annual tax of ten mills on the dollar, it is without authority to levy an additional tax to pay a judgment against the parish, when it is not shown that the judgment was founded on a contract. The restriction on the taxing power contained in Act 209 of the State Constitution must be enforced in all cases where it does not contravene the inhibitions of the federal Constitution.

Witkowski and Husband vs. *Bradley, Sheriff*, 904.

Act No. 126 of 1882 is the legislation intended to make effective Article 209 of the Constitution, and a tax levied under its provisions is legal and binding.

But Section 2 of said Act, which requires the vote of the majority of the property taxpayers, is antagonistic to the proviso of Article

TAXATION—*Continued.*

209, which requires only the majority of the legal votes cast at the election. That provision of the Act is therefore ineffectual, and the Act must conform in that particular to the constitutional requirement.

The failure to publish the names of all the signers of a petition for a special tax, in excess of the rate as limited by Article 209, will not invalidate the tax.

Mrs. Duperier vs. *Viator, Sheriff, etc.*, 957.

Sawmills are not manufactories within the meaning of the provisions of Article 207 of the Constitution, and are therefore not exempt from taxation.

Jones et al. vs. *Raines, Sheriff*, 996.

However clear may be the power, or even the duty, of the legislature to tax any particular species of property, the burden cannot be imposed until that power is exerted.

Act No. 77 of 1880 had in contemplation the assessment and taxing of shares in money making and dividend paying corporations. It was not designed to embrace corporations like the Cotton Exchange, which is not a money making and dividend paying corporation.

The Court will not pass upon the liability *vel non* to taxation and the regularity *vel non* of the listing of property, in the absence of a law actually providing for its taxation and assessment.

Cotton Exchange vs. *Assessors*, 1154.

Where a tax was duly levied on a factory for the manufacture of articles of wood, by the City of New Orleans, and included in the City budget for 1879, collectible in 1880, an exemption therefor cannot be claimed under Article 207 of the present Constitution, subsequently adopted. That Article had no retroactive effect. The case comes within the scope of the decisions of City vs. Vergnole and Succession of Dupuy, 33 An. 39 and 258.

New Orleans vs. *L'Hote & Co.*, 1177.

TAXES.

The object of this suit was, in substance, to have the Ordinances of the City of New Orleans, levying the 15 mills tax for the alimony of the City and the premium bonds, and levying the 16¾ mills tax for the judgments of the U. S. Courts declared null and void; and also to enjoin the collection of such taxes.

The decision reasserts the constitutionality of the premium bond Act, (Act No. 31 of 1876) as established in previous cases, and the want of the the foundation of the theory that, under the present Constitution, no tax exceeding ten mills on the dollar can be collected.

TAXES—*Continued.*

The nature, object and legal bearings of said premium bond Act are examined at length in the opinion of the Court.

Held, that the premium bond tax should be levied and collected in full, and not, as claimed by the plaintiffs, under the circumstances of the case, only in such proportion as the outstanding premium bonds bear to the whole twenty millions contemplated in the Act of 1876.

H. J. Rivet et al. vs. *New Orleans*, 134.

The payment of taxes, whether due to the State or parish, or to incorporated villages, towns, or cities, can no longer be enforced by suit, but only in the mode provided by the Act of the General Assembly, approved July 5, 1882.

Alexandria vs. *A. Heyman*, 301.

The payment of taxes of whatever kind cannot be enforced by suit since the Constitution of 1879 became operative through the legislation thereunder upon that subject.

Alexandria vs. *Williams et al.*, 329.

A "mechanic who employs assistance" is exempt from a license tax upon his trade, under the clause of the Constitution excepting those engaged in mechanical pursuits from the enumeration of occupations liable to such tax.

New Orleans vs. *T. Bayley*, 545.

The City of New Orleans has no authority to exempt property from taxation or to agree to a commutation.

The stipulation in a contract that a bonus of a certain proportion of gross profits realized shall be paid to the City, provided the property yielding the revenue from which the same are derived shall be exempt from municipal taxation during the existence of the privilege granted, is in violation of the Constitution and must be considered as not made. The nullity of such stipulation renders void the agreement which depends upon it.

The City cannot claim both. It can claim the taxes only and is entitled to the privilege allowed by law. Where the bonus has not been paid as taxes and has been appropriated to purposes other than those to which taxes must be devoted, the taxes cannot be considered as satisfied by the payment of the bonus. Taxes are not compensable. The party who has paid the bonus is entitled to recover as an ordinary creditor only.

New Orleans vs. *Sugar Shed Co.*, 548.

The Statute expressly requires that the taxes levied by the police jury for school purposes shall be paid over by the tax collector directly to the treasurer of the parish school board.

Where the tax collector has unlawfully paid over such funds to the

TAXES—*Continued.*

treasurer of the police jury, the duty to pay over to the school treasurer passed, with the funds, to the treasurer of the police jury, and, on his refusal, is the proper subject of enforcement by mandamus.

State ex rel. Leche vs. *Treasurer, etc.*, 1148.

TAX SALES.

A tax title, regular in form, duly recorded, and accompanied by possession, cannot be attacked collaterally or disregarded by direct seizure of the property held thereunder, in execution of judgments or mortgages against a former owner; at least, unless absolute nullity of the tax title is patent on the face of the deed.

No such nullity being apparent on the face of the plaintiff's deed, his injunction herein, restraining the seizure and sale of the property by a creditor of a former owner, was properly perpetuated.

F. B. Ludeling vs. *McGuire, Sheriff*, 893.

Where, by proceedings absolutely null and void, property has been adjudicated to the State in tax proceedings, and subsequently the State transfers the same by adjudication to third persons, under Act 107 of 1880, the owner, in reclaiming his property, is not bound to make the State a party, and is not remediless because the State is exempt from suit.

Assessment, advertisements, notices, sale of property, in the name of Denègre and Powell, are absolutely null and void when the property had never belonged to such joint owners, but had been owned by Jas. D. Denègre alone from the moment of its severance from the public domain.

Denègre vs. *Gerac et als.*, 952.

A legal assessment is essential to the validity of a tax sale, and where that is wanting, the sale will not be protected by the prescription of two, three and five years. Such sale, however, being made by competent authority, where no nullity is patent on the face of the deed, the purchaser cannot be held a purchaser in bad faith, but is entitled to be reimbursed the legal taxes paid, and for useful improvements. Previous decisions reaffirmed.

Parol evidence is inadmissible to prove the assessment and payment of a special tax, where it is not shown that there exists no written evidence of said facts.

T. J. Hickman et al. vs. *M. P. Dawson et al.*, 1086.

WILL.

A testator gave instructions to his lawyer of his testamentary dispositions, who reduced them to writing. The next day, before the notary and witnesses, one of the latter read from this memorandum

WILL—*Continued.*

to the testator, who repeated the words as uttered to the notary in the presence of the other witnesses; the testator not being able from some transient cause to read the manuscript. *Held*, this was a dictation of the will within the meaning of the Code. There was no suggestion that the will was not in literal conformity to the memorandum, and none that the memorandum was not a faithful expression of the testator's instructions.

If the testator be shown to have been of sound mind and disposing memory at the time of confecting the will, eccentricities of conduct and even partial aberration at other times will not affect his testamentary capacity.

It is, and should ever be, the aim of courts to give effect to wills. Testamentary freedom is too valuable and sacred to be interfered with, and will not be, when testamentary capacity is shown to exist, and the forms of law are complied with.

Testamentary capacity is the ability to comprehend tho conditions of one's property, and the testator's relations to those who may naturally expect to become the objects of his bounty.

M. Godden vs. *Executors of E. Burke et als.*, 160.

The revocation of a will by the act of the testator may be express or tacit. It is express when the testator has declared in writing that he revokes the will, or a particular disposition in it. It is tacit when he has made another disposition repugnant to and inconsistent with the previous one, although nothing is said about revoking it, or when he has done any act which indicates a change of intention, whatever that act may be, provided always the intention to revoke is fairly and legally deducible from it.

Erasures not approved by the testator are considered as not made, and this applies to those erasures which are made of parts or clauses of a paper admittedly existing as a will, and not to that part, the erasure of which would destroy it as a will, such as the signature.

If the erasures do not so obliterate the words that it is impossible to distinguish them, and the Judge considers the erasures important, that is to say, of material words, he shall pronounce the nullity of the will. *Aliter*, he cannot decree its nullity.

The effacement and obliteration of the signature to a will by the testator, if done with the intent to revoke, which intent may be deduced from that and other circumstances, will have the effect of revocation. Any act defacing an existing will, done by the testator, derives its character solely from the intent with which it is done.

Succession of Louis Müh, 394.

The cardinal rule in the interpretation of wills is to ascertain the intention of the testator, and to give effect to it when ascertained.

WILL—*Continued.*

A legacy of "the residue of my property of every description" is an universal legacy. Descriptive words of the different kinds of property composing that residue are not words of limitation, but of illustration.

An universal legacy carries the totality of the property owned by the testator at the time of his death, and includes property acquired after the date of the will as well as that owned at that date, and this is true even when the character or kind of property has been wholly changed in the interim between the making of the will and the death.

Particular legacies which have lapsed by the death of the legatee before the testator, or from other inability of the legatee to take them, fall into the residuum, and go to the universal legatee and not to the heir.

The universal legatee takes everything that has not been validly given away.

Succ. Valentine, 12 An. 286, and Lawson's Case, Ibid. 603, overruled.
Succession of J. Burnside, 708.

In the execution of nuncupative wills under private signature, the law authorizes the testator to cause his will to be written out of his presence and of that of the instrumentary witnesses.

The person who has acted as the *amanuensis* of the testator for that purpose is not disqualified, on that account, from officiating as one of the witnesses to the will, and can be counted as one of the five witnesses required by law.

Presentation of a nuncupative will, under private signature, by a testator, admits, supplies, or dispenses with a formal dictation.

Where the will of the husband and that of the wife, or any two persons, are written out by the same party, on the same day, in favor of the same beneficiary, and are presented by the testators separately to the required number of competent witnesses, with the proper statement, at different times though on the same day, they constitute two disconnected, distinct, and independent acts, and are not amenable to the prohibitions contained in Article 1572 of the R. C. C.

The burden of proving insanity rests on the party alleging it.
Wood et al., vs. *J. S. Roane*, 865.

A will speaks as of the death of the testator, and conveys all the property owned by him at that time, unless a contrary intention manifestly appears. This is true even though the property may have been wholly changed in the interval between the making of the will and the death.

WILL—*Continued.*

The word "property" used in a will has as broad meaning as "estate" or "succession," and is identical with those words.

Succession of Valentine, 12 An. 286, and Lawson case, Ibid. 603, overruled.

Succession of J. Marks, 1054.

WRIT OF ERROR.

A writ of error, though operating as a supersedeas, does not have the effect of reviving or continuing in force the injunction dissolved by the judgment from which such writ of error has been obtained.

But it is also the rule, based upon a principle of comity, that the court from whose judgment the supersedeas has been taken, should not render any decree during the pendency of said supersedeas, which would practically destroy its effects.

Therefore, this Court will not, in the present case and at the instance of the relator, order the payment of an entire fund to him, whilst other parties are also claiming payment out of it, in the Supreme Court of the United States, under a writ of error to this Court, which operated as a supersedeas.

The principles upon which the decision of this Court is based in the Hart case are formulated anew in this case.

State ex rel. Newman vs. *Burke, Treasurer*, 185.